Actions for Slaunder,

OR,

A Methodicall Collection under certain Grounds and Heads, of what words are actionable in the LAW, and what not?

A Treatise of very great use and consequence to all men, especially in these times, wherein Actions for Slaunder are more common, and do much more abound then in times past: And when the malice of men so much increases, well may their tongue want a Directory.

To which is added,

AWARDS or ARBITREMENTS,

Methodised under severall Grounds and Heads, collected out of our Year-Books and other private authentick Authorities: wherein is principally shewed, what Arbitrements are good in Law, and what not.

A learning of no lesse use and consequence to all men, then the former: for that submissions to Arbitrements were never more in use then in these times. And this learning well observed, would avoid multitudes of suits and contentions which daily arise through the defects of Arbitrements.

By JO. MARCH of Grayes-Inne, Barister.

LONDON,
Printed by *F. L.* for *M. Walbank* and *R. Best*, and are to be sold at Grayes-Inne-Gate.
1647.

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A methodicall Collection, under certaine Grounds and heads, of what words are actionable in the Law, and what not?

THE first part of my labour is, to shew what words are actionable in the Law, and what not? In the prosecution of which, ti's not my purpose to run over all the cases that have bin adjudged, neither can I if I would; my intent is only to lay downe a certaine rule or ground, upon which to go (which will indeed be as a light to all Cases of this nature) and having done so, to follow every particular thereof, with the most pertinent cases that I finde adjudged in the Law; which done there

will be very few cases of consequence hitherto adjudged omitted.

But before I enter upon this part of my labour, give me leave to premise this, that I do not undertake this work, with an intent to incourage men in giving ill and unworthy language, or to teach them a lawlesse Dyalect, but (as my Lord *Cook* speakes) to direct and instruct them rightly to manage that, which [though but a little member] proves often the greatest good, or the greatest evill to most men. And withall to deterre men from words, which are but winde (as hee further speakes) which subject men to actions, in which dammages and costs are to bee recovered, which usually trench to the great hinderance and impoverishment of the speakers.

Cooke, l. 4 fol. 20.b.

And in truth that which caused mee to enter upon this labour, was the frequency of these actions; for I may with confidence affirme, that they doe at this day bring as much Gryse to the Mill, if not more, then any one branch of the Law whatsoever. And it were to bee wished (and certainly never in a better time then now) that the greatest part of them

them were suppressed, that words only of brangle, heate and choler, might not be so much as mentioned in those high and honourable Courts of Justice. For I professe for my part, I judge of them as a great dishonour to the Law, and the professors thereof; especially when I consider that they are used only as instruments to promote the malice, and vent the spleene of priyate jarres and discontents amongst men.

The Apostle calling in question the wisdome of men, *for going to Law one with another*, is not to bee intended [as the learned observe upon that place] generally to condemne all legall prosecutions, be anse a man may without question maintaine his just rights & priviledges b Law, but onely to reprehend the folly o' such, who upon every slight and trivial occasion (like many in these contentio times) care not to intayle a suite u them and their posterity; though in Fine they docke their owne intayles without recovery: and justly may actions for words come within the compasse of the Apostles exprobration. 1 Cor. 6. verse 5.

I doe not condemne all actions for

words neither, for it is but equall, that where a mans life, livelihood, or reputation (which is dearer to him then the former) is much endangered by scandalous words, that in such case the offender should bee inforced by action to make compensation. But that a man should flee to the Law out of malice, and make the Courts of Justice maintainers of every small and vaine brabble, this seemes to me utterly unlawfull and intolerable amongst Christians.

Cooke, lib. 4. f. 15. b. I cannot but take notice of that which *Wray Chiefe Justice*, saith in *Cookes* 4th Booke, That though slanders and false imputations are to be repressed because that oftentimes *a verbis ad verbera pervenum est*; which I confes tends much to the disturbance of the common peace, and therefore by all meanes possible to bee prevented. Yet he saith, that the Judges have resolved, that actions for scandalls should not bee maintained by any strained construction or argument, nor any favour extended for supportation of them. And he addes the reason of it, because they doe abound more in these dayes, then in times past, and the intemperance and malice of men increases;

creases; *Et malitijs hominum est obviandum*; and further addes, that in our old bookes, actions for scandalls are very rare, and such as are brought, are for words of eminent slander, and of great importance.

It is true that the Law doth in some cases discountenance these actions, and therefore we have a rule, that words if they admit of a double construction, shall alwayes be taken in the best sence for him that speakes them (as I shall make evident hereafter) because usually they are spoken in chollar and passion.

This I say the Law doth, where the words are amphibolus; but if the words are clearely actionable, in such case the Law will never ayde a man, though they were spoken in the distemper of passion, which seemeth very hard and unreasonable.

Nay which is yet more extreame, if counsell shall but informe the Jury of the quality and reputation of the Plaintiffe and also make them understand [if they be capable the true sence and meaning of the words, and the hainousnes of them; such words against such a per-

ſon; this inforced and preſt on by eminent Councell, ſhall make a Jury give a hundred pounds dammages, whereas it doth not appeare to them, that the Plaintiffe by the ſpeaking of the words was prejudiced one farthing, a caſe of very great extremity, and worthy of reliefe.

And can any man deny, but that this is a countenancing of theſe frivolous Actions. But give mee leave Reader, and I will in a word informe you how this may be remedied: and though the malice of men cannot bee ſtopped, yet their Actions may.

Let no words be actionable which do appeare to have beene ſpoken in chollar and paſſion, or if actionable, yet let the Plaintiffe recover no more in damage, then hee can upon Oath make appeare, that hee was actually damnified by the ſpeaking of them; and if this were provided by Act of Parliament, our new bookes would bee as little infeſted with theſe frivolous actions, as the old ones are. But I cannot thus baulke that obſervation of that learned Chiefe Juſtice who ſes that in our old books Actions for ſcandalls are very rare, and ſuch as

are

are brought, are for words of eminent slanders and of great importance.

This must needs bee acknowledged to be a most exact and true observation, for in searching of the Books, I cannot finde that any Action for scandalous words was brought before *E.* 3. time, and so rare then, that I finde but one in 50. yeares of *E.* 3. and that is Sir *Thomas Setons* case of Justice, for calling of him *Traytor. Felon*, and *Robber*, no frivolous cause of action. 30. Ass. fol. 19.

And I finde but three Actions for words brought in 22. yeares of *E.* 4. and those for one and the same words, for publishing one to bee the *Villeine* of *I. S.* a slaunder of no small importance, neither; for so long as that base and slavish Tenure of *Villeinage* held; hee that was a *Villeine*, was subject both in person and estate, to the will of his *Lord*, so that he might seize all his estate reall, and personall, and Vassalize his person at his pleasure, so that he did not kill or mayme him 21 *E.* 4, 5, 15. *E.* 4. 32. & 4. 3.

In all the 21. yeares of *H.* 7. there is not one action that I can find brought for scandalous words.

And in 38. yeares of *H.* 8. our books

tell us but of five actions brought for scandalous words; two whereof were in 27. *H.* 8. so that I find none before that time neither. The other were in 30. *H.* 8. and 28. *H. Dyer.* And these for no trifling words; for you shall finde that one of them was for calling a man *Heretike*, another for saying a man was perjured; and the other three for calling of one Thiefe, all of which are high scandals to a mans reputation and most of them tending to the losse of life and fortunes; so that it is very true that that Reverend Chiefe Justice observed, that these Actions were very rare in our old bookes, and such as were brought were for words of emminent slander, and of great importance.

27. H. 8. 24. & 22. 30 H. 8. Br. Action upon the case 104. 28. H. 8 Dy. fo. 19 tol. 112 & fol. 26, fol. 171.

But these few have now got such a numerous progeny that I feare we cannot turne over many leaves in our new books, but wee shall finde one of these Actions. They began thus to multiply in the *Queenes* time, as wee finde in my Lord *Cookes* 4. book, where there is no lesse then 17. adjudged cases together upon these Actions.

And you may easily judge, they did not abate in *King James* his time; for

if

(if I miſtake not) there is no leſſe then two and twenty adjudged caſes upon theſe Actions in my LORD *Hobarts* Book.

And I am certaine they are not fallen in His Majeſties Raigne that now is; for I my ſelfe have reported no leſſe then three and twenty judgments upon theſe Actions but from *Eaſter* Tearme in the ſixteenth yeare of the King, to *Trinity* Tearme in the eighteenth.

Well therefore might *Wray Chiefe Juſtice* ſay, that the malice of men doth more increaſe in theſe times, then in times paſt; and as he ſaith, the malice of men ought to be withſtood as much as may be; which I am ſure the too frequent tollerating of Actions of this nature will not effect, no more then fire can be extinguiſhed by adding fewell unto it. You have heard my advice and direction before, therfore I will here cloſe this with one word, though the tongues of men be ſet on fire, I know no reaſon wherefore the Law ſhould bee uſed as Bellowes to blow the Cole.

Pſal. 39. ver. 1. 2.

It is the ſaying of the Prophet *David*; *I will take heed to my ways, that I offend not with my tongue, I will keepe my mouth*

mouth as it were with a Bridle. It were happy for all men if they could make the like reſolution, and keep it. But ſeeing that wee are but men; whileſt wee carry this lump of fleſh and maſſe of corruption about us, we ſhall be ſubject to the like paſſions and affections that others have beene before us, and the fleſh will rebell againſt the ſpirit. And therefore I have provided this Treatiſe upon Actions of ſlander, as a Bridle for all raſh and inconſiderate tongues; that ſeeing the miſchiefe they may the better know how to avoyd it.

And here I ſhall lay downe this as a generall rule, which I ſhall by the way as I goe, make good in every particular.

That all ſcandalous words which touch or concerne a man in his life, Liberty, or Member, or any corporall puniſhment; or which ſcandall a man in his Office or place of Truſt; or in his Calling or function by which he gaines his living; or which tend to the ſlandering of his Title or his diſinheritance; or to the loſſe of his advancement, or preferment, or any other particular damage; or laſtly which charge a man to have any dangerous infectious diſeaſe,

by

by reason of which he ought to seperate himselfe, or to be seperated by the Law from the society of men: all such words are actionable.

And first for the first part of this Rule viz. *Scandalous words which touch or concerne a man in his life; such words are actionable.*

If a man call another Traitor, Felon, Theefe, or Murderer, an Action lies for these words, because they call a mans life in question. 30. Ass fol 19. 27. H. 8. 14. & 22. *Cooke lib.* 4. fol. 16. *Dyer*, fol. 26. t. 171 & 236. fol 26. *Heb.* Rep: fol. 8 Pl. 11. & 247. pl. 196.

So it is all one if one shall say of another that he killed or murdered *I. S.* or that he stole his goods, or that he poysoned him, if it appeare to be intended to be wittingly done, or the like, these words likewise are Actionable, as appeares by the Bookes in the Margent.

So if one shall say of another he hath burnt my Barne with Corne, which is Felony, this likewise will beare an Action. *Cooke*, l. 4. fol. 20.

I have a Report of a case which was thus: a Servant of one Mr. *Roger Brook* said of one Mis. *Margaret Passey* that she sent a Letter to his Master, and in the said letter willed his Master to poyson his Wife *Bridget Brooke*, and in this

case

case it is said that upon a Writ of Error brought in the Exequer Chamber it was resolved, the words were action nable, and the judgement affirmed, which case I confesse I much doubt, because here was but bare advise, and nothing appearing to be done; like *Eatons* case in Cooks 4 Booke.

Cooke, l. 4. fol. 16. b.

Where the Defendant said of the Plaintiffe that *Hee gave his Champion Councell to make a Deed* of gift of his goods to kill him, *&c.* adjudged that the words were not Actionable, because that the purpose or intent of a man without act, is not punishable by the Law.

And I conceive it will not be like the case, put by *Tanfield Just.* in *Harris* and *Hixons* case, where he saith that to say of another, that he lay in wait to Rob or to murder *I. S.* will beare an Action, because that he accuses him of an act *viz.* The preparation and lying in wait, which is punishable by the Law; but in the former case there is nothing but bare advise, which is not punishable by the Law.

Pasch. 5. Iac. in the Kings Bench.

Mich. 15 Eliz. Dyer fo. 317. fol. 8.

Hawly brought an Action upon the case against *Sydnam* for these words; h

is

is infected of the Robery and Murder lately committed, and ſmels of the murder, adjudged that the words were actionable, by reaſon of the word infected.

One ſaid of another thou diddeſt kill a Woman great with Child, *innuendo Locoſam Vxorem cuiuſdam R. S. defunct.* and ruled by the Court that the Action wold lie, though that the woman were utterly incertain, becauſe that the offence, and the party intended to commit it, is certaine, and tis not like the caſe, where one ſaid that there is one in this company, who hath committed a murder, there it is incertain of whom the words were ſpoken, and cannot poſſibly bee ayded by an (*innuendo*) but here the words are Actionable without an (*innuendo*) but quære whether the Action would lie or no becauſe there is no expreſſe averrement that the Woman was dead for the (*innuendo*) will not be ſufficient. Mich 2 Iac. in the Kings Bench. Paſch. 1. Iac. in Bt. Rs. Rot. 107.

Haſſellwood brought an Action againſt *Garret* for theſe words (amongſt others agreed not to be actionable) whoſoever is he that is falſeſt Theefe, and ſtrongeſt in the County of *Salop*, whatſoever he

he hath ſtollen, or whatſoever he hath done. *Thomas Huſſelwood* is falſer then hee reſolved that theſe words are actionable, with an averrement that there are Felons within the County of *Salop*, but for default of ſuch averrement, the judgement being given in the Common Pleas was reverſed in this Court.

Averment

Paſch. 5. Jac. in the Kings Bench.

Stoner brought an Action for words againſt *Gambell*, and declares that the Defendant *dixit deprefato*: the Plaintiffe thou *innuendo*, &c. haſt ſtollen my Goods; and upon not guilty pleaded, the Iury found for the Plaintiffe, and in arreſt of judgement it was ſaid, that the Count was nought for the words are in the ſecond perſon, and it is not all adged that the Plaintiffe was preſent at the ſpeaking of them. *Et Tota Curia contra*, for *dixit deprefato*, is as much as *Dixit ad prefatum*, for cannot ſay thou haſt of the Plaintiffe, except that it were ſpoken to him? and rule was given for judgement.

Words in the ſecond perſon, though the party be not preſent, actionable

Cook lib. 4. fo. 15. b

One *Thomans* ſaid of *Hext*, I do not doubt but within two dayes to Arreſt *Hext* for ſuſpition of *Fellony*: adjudged that the words were Actionable, becauſe

cause that for suspition of Felony, hee shall be imprisoned and his life drawne in question.

Hill. 20 *Iac.* in the Kings Bench, *Winch* came to the Barre and shewed a Libell against another in Court Christian for these words, thou art a Witch and dealest with Witchery, and diddest procure Mother *Bale* to witch the Cattell of *I. S.* and upon this prayed a prohibition, because that the Plaintiffe had remedy at Law, and by *Fenner and Gawdy Justices* the others absent and Prohibition lies, because she hath remedy at Law. So that their opinion was that an Action would lie at the Common Law for calling of one *Witch*.

And in one *Edwards* his case *Hill.* 40 *Iac.* it was said to have been three times adjudged that to call one *Witch* would beare an action and also that an action would lie for calling of one *Hagge* but I doubt of the latter because I take *Hag* to be a doubtfull word. But why *Witch* should not beare an Action, I know no reason, being the life may be thereby drawne in question, though I know it hath beene doubted. Hill. 43 Iac. in the Kings Bench. Hob. Rep: pa: 155.

Marshall brought an Action against *Steward*

Steward for saying the Devill appeares to thee every night in the likeneſſe of a black man riding upon a black Horſe, and thou conferreſt with him, and whatſoever thou doſt aske he gives it thee, and that is the reaſon thou haſt ſo much money, adjudged the words were Actionable. *Note Reader*, that by the Statute of 1o of King *Iames cap.* 12. Conjuration or conſultation with the Devill, is Felony.

Mich. 17 Car. in the Kings Bench.

In the caſe of *Hawes Mich.* 17. of the King that now is, this caſe was put and agreed by the Iudges; one ſaid of another that hee had received a *Romiſh Prieſt*, adjudged actionable, becauſe it is Felony, he might receive a Romiſh Prieſt and yet not know him to be ſo, (like the caſes I have put you afterwards) therefore *Quere.*

Hob. Rep. pa: 352

Sir *John Sydenham* againſt *Timothy Man Clark.* I think in my conſcience that if Sir *John Sydenham* might have his will, he would kill all the Subjects in *England* and the King too, and he is a maintainer of *Papiſtry* and *Rebellious Perſons.* Theſe words upon a Writ of Error in the Exchequer Chamber were adjudged actionable.

It

It seemes somewhat hard to me *Reader* that words of thought or opinion only should beare an Action as here in the former words. And for the latter words, that he is a maintainer of *Rebellious Persons*; they are Adjective only, and do not import any Act of rebellion in these Persons, but only an inclination to it, but of this more hereafter. See fo 32. b. Cooke lib. 4. fo 19. a. b.

If a man say of another that he doth like or approve of those that maintaine sedition against the King. I conceive that these words are actionable and sedition is a violent and publique thing, of which he cannot but have notice. Coke lib. 4. fo 13

This Rule was agreed by the Judges in the debate of a case in the Kings Bench, that many words (though of themselves they be not actionable) yet being equivolent to words that are actionable, will beare an Action. Pasch. 15. Car. in the Kings Bench.

And it was said by *Ioues Iustice*, that in Yorkshire straying of a *Mare* is all one with Buggering of a Mare and therefore he said that an action will lie for these words, with an averrement that they tantamount to Buggering of a Mare. Note by his opinion in such

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case there must be an averrement of the meaning or importance of the words.

Averrement.

Yet my Lord *Hobart* hath severall cases adjudged where a man brought an action for Welch words, and did not averre what the words did import in English, and yet judgement was given for the Plaintiffe, and the Court tooke information upon Oath by *Welchmen* what the words meant in English.

Hob. Rep. pa. 165. & 268 pl. 236. Gibs and Gin kins case. Averrement.

And in one of the cases Serjeant *John Moore* then informed the Court that judgement had bin given in the Kings Bench in the case of *Tuoh* upon these words *Thou art a healer of Fellons* without any averrement, how the words were taken; because the Court was informed and tooke knowledge that in some Counties it was taken for a smotherer of Fellons.

6. Iac. in the Kings Bench.

The case intended by Serjeant *Moore* was I conceive the case of *Pridham* and *Tucker* in the Kings Bench, where the words were adjudged actionable, without an averrement, and in this case it was agreed that words may be slanderous in one County and not in another for in *Norf* they know not what *healer* signifieth, but this being in *Devonshire* where

Pasch. 7. Iac. in the Kings Bench.

Words slanderous in one County and not in another.

where this word is used for concealer of Theeves, will be actionable.

And I take this to be generally true that in all cases where a mans life may bee drawne in question by scandalous words, that such words are Actionable.

And now I shall cite a case or two, *where words spoken which touch a mans life, which are by way of interrogation, or by way of heareſay or relation, or laſtly by way of negation only and yet will beare an Action.*

Paſch. 15. Car. VVords ſpoken by way of interrogation.

It was ſaid at the Kings Bench Barre [which I heard and obſerved] that it had bin adjudged in this Court in one *Appletons* caſe, that where a man ſaid to another where is my *Peece* thou ſtolleſt from me, that theſe words were Actionable.

By way of report or Relation.

And *Ionas Iuſtice* then ſaid that he remembred this caſe to be adjudged. *A.* ſaid that *B.* told him that *C.* ſtole a Horſe; but he did not beleeve him, that theſe words, with an averrement that *B.* did not ſay any ſuch thing to *A.* were actionable.

Hill. 4. Iac. in the Kings Bench Rot. 1153.

Agreeing with this caſe is the Lady *Morriſons* caſe Widdow, who brought an action for words againſt *William*

Cade Esquier, and declares that she was of good fame, &c. and that *Henry* Earle of *Kent* was in speech and communication with her concerning Marriage, the Defendant *premissorum non ignarus*, said these words, *Arscot* hath reported that he hath had the use of the Lady *Morrisons* body at his pleasure; *ubi revera Arscot* did never report it; and alledges that the Earle of *Kent* upon the hearing of these words surceased his suit, by which she lost her advancement, *&c.* adjudged that the words were Actionable though spoken upon the report of another, for otherwise a man might malitiously raise slanderous Reports of another, and should never bee punished for it.

But in this case *Tanfield Iustice* said, that if it had beene expressely alledged, that in truth it was so reported by *Arscot*, then an action would not lie against *Cade* for saying that *Arscot* reported it, because it is true that he did so.

And *Bartley Iustice* said that an action had bin brought for these words, *You are no Theefe*. In which there was an averrement, which implied an affirmative, and agreed to be Actionable, and

Pasch. 15 Car. negative words actionable.

Appletons

Appletons case was then agreed for Law.

A. said to *I.* *hast thou beene at London to change the money thou stolleſt from me?* In this case it was objected, that theſe words were not actionable, becaule that they are ſpoken onely by way of interrogation, and are no direct affirmative. But *Jones and Bartly Juſtices* (the others being abſent) both ſaid that the words were actionable; for the firſt words, *Haſt thou beene at London, &c.* are the only words of interrogation, and the ſubſequent words, viz. *The mony thou ſtolleſt from mee*, is a poſitive affirmation, and *Fa tley Juſt.* then ſaid, that it had beene oftentimes adjudged that words of interrogation ſhould be taken as a direct affirmation, which *Jones Juſt.* alſo agreed, and further ſaid that this caſe had bin adjudged. *Mich.* 15 *Car.* in the Kings Bench. Words of Interrogation.

One ſaid to another, I dreamt this night that you ſtole a horſe, theſe words were adjudged actionable. And he ſaid that if theſe and the like words ſhould not beare an action, a man might bee as abuſive as he pleaſed, and by ſuch ſubtill words as theſe always avoyd an action. I dreamt you ſtole a horſe, actionable

And how I will put you a caſe or two,

where words which imply an affirmative shall be actionable.

Pasch. 15. *Car.* in the Kings Bench. One said of another, he would prove he had stollen his books. In this case the opinion of the Court was that the words were actionable, because they imply an affirmative; and are as much as if hee had said, that he had stollen his Books. And so if I will say of another, that I will bring him before a Justice of Peace, for I will prove that he hath stollen &c. though the first words are not actionable, yet the last are.

Pasch. 5. *Jac.* in the Kings Bench. *Whitacre* brought an action against *Lavington* for these words; I will prove that *Whytacre* is forsworne, and that ten men can justifie, and I could prove him perjured if I would, adjudged that the words were actionable, for that it is a great slander to be reported, that it is in the power of any one to prove one perjured; and it is as a direct affirmance.

Pasch. 7. *Jac.* in the Kings Bench. It will be proved by many vehement presumptions, that *Welby* was a plotter and contriver of *Thomas Powels* death because hee would not sell his Land to the said *Welby*: adjudged the words were actionable.

And now I have shewne you the affirmative

firmative part, where words which touch or concerne a mans life ſhall bee actionable. I ſhall now ſhew unto you the negative part, where words in ſuch caſe ſhall not be actionable.

Words that touch or concern a mans life may not be actionable in theſe caſes: Where they are too generall, or not poſitively affirmative; or of a double or indifferent meaning, or doubtfull in ſence; or for that they are incertaine in themſelves, or the perſon of whom they are ſpoken; or elſe by reaſon of the ſubſequent qualification of the words, or becauſe they doe not import an Act, but an intent, or inclination only to it; or for that they are impoſſible, or laſtly, becauſe it doth appeare that the ſpeaking of them could be no dammage to the plaintiffe, in all theſe caſes the words will not be actionable.

And firſt, words that are too generall, or not poſitively affirmative, will not bee actionable.

To ſay of a man that he deſerves to be hanged; adjudged not actionable, becauſe they are too generall, for that hee doth not ſhew any thing that hee hath done to deſerve it: and by *Yelverton Juſtice*, hee may deſerve it for unnatu- *Mich. 4. Jac. in the Kings Bench.*

rall using of his Parents, and the like, where he shall not bee punished by the Law.

Cooke, lib. 4. f. 15. b. Yeomans and *Hexts* case, for my ground in *Allerton Hext seekes my life*, adjudged not actionable, because seeking his life is to generall, for which there is no punishment.

Pasch. 7. Jac. in the Kings Bench. So if I say of another that it is in my power to hang him, adjudged not actionable, in *Prisdham* and *Tuckers* case cited before, because the words are too generall.

Hob: Rep. p. 247. pl. 196. *James Steward* brought an action against *Bishop* for saying of him, that hee was in *Warwicke* Gaole for stealing of a Mare and other Beasts, and adjudged, that the words would not beare an action because they doe not affirme directly that he did steale them; as if he had said that he stole them, and was in *Goale* for it, but onely make report of his imprisonment and the supposed reason of it, and it may very well be, that the Warrant of Mittimus was for stealing expressely, as is the common forme of making of the Kalender of the Prisoners for the Justices of Assize, and the like.

George

Georg Bland brought an action against *A. B.* for saying that he was Indicted for Felony at such a Sessions; it was said, that it was questioned, whether an action would lie, because an Indictment is but a surmise. But I conceave that it is without question, that no action will lie in such case; because that to say a man was indicted of Felony, is no more then to say hee was impeached or accused for Felony, which an honest man may bee; and is no positive affirmation that hee had committed Felony, and so it hath bin often adjudged, I will only cite one case in the point. *Hob: Rep. p.309. pl.219.*

Hasselwood brought an action against *Garret* for these words; *I can finde in this Parish a falser knave then* Briscoe *is the which* Briscoe *is indicted of Felony & burglary, and is gone to* Stafford *Goale*; *and that false knave is* Thomas Hasselwood, *&c.* it was adjudged that these words are not actionable, because that *Briscoe* might be indicted, and yet be an honest man. *Pasch. 1. Jac. in the Kings Bench. Rot. 107.*

Thou hast layen in Fullers Tubbe, in which none come, but those that have the Pox adjudged the words were not actionable, because this is no direct affirmation *37. Eliz. Chappell and Barroughes case.*

tion

tion that the Plaintiffe had the Pox.

Hob: Rep: p.425 pl. 381. *Poland brought an Action againſt Maſon, for ſaying, I charge him* (meaning the Plaintiffe) *with Felony, &c.* adjudged the words were not actionable, becauſe that he doth not affirme that he is a Felon, but doth only ſay, that he doth charge him with Felony, which he may do in ſome caſes, though he did not the fact, as if a Felony were done, and the common fame were, that he did it, any one that ſuſpects him may charge him with it.

Hob: Rep: p. 308. pl. 286. *Henry* brought an Action againſt *Fitch* for theſe words; *I arreſt you for Felony:* agreed that the words were not actionable, for this is no poſitive charge that hee was a Felon, and this may bee lawfully done upon a common fame as is ſaid before, thus you ſee that words that are not directly affirmative wil not beare an action.

Yet you may ſee before *fol. 7.* where words which imply an affirmative only ſhall be actionable, as to ſay, that I will prove that you ſtolemy Books, or the like, but of this ſufficient.

fol. 10. b. & 11. Secondly, *Words that are of a double or indifferent meaning, The Law wil take*

in

in the beſt ſence for the Speaker, and ſo adjudge them actionable, for the rule of Law is (as I have ſaid before) *that verba accipienda ſunt in mitiori ſenſu:*

Yeomans and Hexts caſe cited before, for my land in Allerton, Hext ſeekes my life, &c. adjudged theſe words were not actionable, becauſe he may ſeeke his life lawfully upon juſt cauſe; and his Land may be holden of him, and ſo in *mitiori ſenſu.* *Cooke l. 4. fol. 15. b.*

Barham brought an Action upon the caſe againſt *Nethersall*, and the words were Matter *Barham did burn my barne, (innuendo a Barne with Corne] with his owne hands, and none but he:* and after verdict it was moved in arreſt of judgment, that the words were not actionable, for it is not felony to burn a Barne, if it be not parcell of a Manſion houſe, nor full of Corne; And in ſuch caſe *agitur civiliter*, and not *criminaliter:* and words muſt be taken in *mitiori ſenſu*; and the *innuendo* will not ſerve when the words themſelves are not ſlanderous. *Cooke l. 4. fol. 20. a*

Ieams his caſe, hang him he is full of the Pox, I marvaile that you will eate or drinke with him, &c. adjudged that the words *Cooke, l. 4. fol. 17.*

words were not actionable, because they ſhall bee taken *in mitiori ſenſu*, for the ſmall Pox and not the French Pox.

Mich: 20 Iac. in the Kings Bench.

But note that in *Hawtry* and *Miles* caſe cited afterwards it was ſaid by *Fenner Juſt*: that to ſay that a man is layd of the Pox, will beare an Action; becauſe that is the phraſe for the *French* Pox.

Hob: Rep: p. 106. pl. 97.

Adrian Coote brought an Action againſt *Adrian Gilbert* for theſe words; *Thou art a Thiefe, and haſt ſtollen a Tree* adjudged that the words were not actionable, and agreed that there is no difference betweene, *and thou haſt ſtollen*, *and for thou haſt ſtollen*; for in common acceptation (and) is to bee underſtood to be but a verifying and making good of the generall word (*Theefe*) and then a Tree ſhall bee underſtood rather of a Tree ſtanding, then felled; which can bee no Felony or Theft, for that a man cannot ſteale a mans inheritance.

Hob: Rep: p. 473. pl. 406.

So *Clarke* brought an Action againſt *Gilbert* for theſe words; *thou art a Theefe and haſt ſtollen twenty load of my Furze* adjudged that the action would not lie for the reaſons given in the former caſe.

The

The like Law is, if a man ſay of another that he hath ſtollen his Apples, or his Corne, or robbed his Hoppe ground, or the like, the Law in theſe caſes will adjudge them rather growing, then gathered or cut downe, and ſo the words not Actionable. Cook l. 4. fo 19. b.

Thus it is evident, that where the words may be taken in a double or an indifferent meaning that the Law will ever take them beſt for the Speaker. I ſhall only put one caſe more upon this ground and ſo paſſe it over.

Pawlin brought an Action againſt *Ford* for theſe words, thou art a Theeviſh rogue, and haſt ſtollen my Wood. It was in this caſe ſaid at Barre the Action would not lie, becauſe it ſhould be conſtrued rather to be wood ſtanding then cut downe, like thoſe caſes put before. Trin. 18. Car. in the Kings Bench.

But *Bramſton chiefe Iuſtice* ſeemed to incline that the words were actionable, becauſe that [wood] cannot be otherwiſe intended then of Wood cut down according to the old verſe; *Arbor dum creſcit, lignum dum creſcere neſcit*, and ſo it was adjourned without more ſaying.

Note

Trin. 4. Iac. in the Kings Bench, Rot. 1366.

Note *Reader*, according to the opinion of *Bramston Chiefe Iustice* betwixt *Litchfield* and *Saunders* for the same words, hee hath stollen my wood, to which the defendant demurred, it was adjudged that the Action would lie, for *Tanfield Iustice* said that the words shall be intended according to the most usuall sence, *viz.* That it was *Lignum*, and not *Arbor*, as if one say that the Plaintiffe hath committed a murder, it shall not be intended that he hath murdered a Hare, but a man.

VVords must be taken according to common intent.

You may here observe (Reader) *that though words of a double or indifferent meaning ought to be taken in the best intendment for the speaker, as I have sufficiently cleared it unto you yet they ought not to be taken contrary to common intendment.*

For as you shall not straine words to an intent not apparent, to make them actionable, so you must not wrest them contrary to common intent, to make them not actionable this is apparent by *Saunders* his case immediatly before, where it is adjudged that to say of another you have stollen my Wood, shall be intended to be *Lignum*, and not *Arbor*,

and

and ſo actionable, ſo to ſay of a man that he hath committed a murder, ſhall not be underſtood murdering of a Hare, but a Man.

Dame *Morriſon* brought an Action againſt *William Cade* Eſquier and declared that ſhe was of good fame, *&c.* and that *Henry* Earle of *Kent* was in ſpeech and communication with her for mariage, the defendant *premiſſo iam non ignarus* ſaid theſe words *Arſcot* hath reported that he hath had the uſe of the Lady *Morriſons* body at his pleaſure; *ubi revera Arſcot* never reported it. And further alledges that the E. of *Kent* upon the hearing of theſe words forceaſed his ſuit by which ſhe loſt her advancement, the Defendant pleaded not guilty, and it was found for the Plaintiffe. It was moved by *Hobart Atturney Generall* that the words were not actionable for this reaſon amongſt others all ruled againſt him] becauſe that the words had the uſe of her Body were incertain and of a double intendment, and therfore ſhould bee taken in the beſt ſence to have the uſe of her body as a Tailor in meaſuring, or a Phiſitian in giving Phiſick or the like, and not in any worſe ſence. But

Hill. 2. Iac. in the Kings Bench Rot. 1153

Words taken according unto common intent.

But by *Popham chiefe Iuſtice* the words are actionable, when words are ſpoken that may have a double intent or meaning, they ſhall bee expounded according to common intent for otherwiſe he which intends to ſlander another, may ſpeak ſlanderous words, which by common intendment ſhall be expounded a ſlander and yet no Action lie. And here the words hath had the uſe of her body at his pleaſure ſhall not be intended in any lawfull manner, but licentiouſly and diſhoneſtly. for this is the common intent, with whom all the other Juſtices agreed.

Mich: 15. Eliz. Dyer fo. 317 Pl. 8

Thirdly, where the words are doubtful in ſence or meaning, there likewiſe they will not be actionable.

To ſay that a man ſmells of a murder lately committed, will not beare an Action, becauſe the words are of a dubious ſence and intendment.

Hob. Rep. pa. 350. pl. 323 Coke lib. 4. 15. b.

Bradſhaw brought an Action againſt *Walker* for theſe words; thou art a filching fellow, and diddeſt filch from *William Parſon* a 100.l. adjudged that the words were not actionable, becauſe that they are of incertaine ſence and meaning.

So

So to call one Harlot will not beare an action. And upon this ground I conceive (as I have said before) that to call a Woman *Hagge*, will not be Actionable. Coke 11th. 4.15.b.

So to say of a man that he is a *Healer* of *Felons*; or that he strained a Mare, as the cases are before put; will not be actionable, because of their doubtfull sence and meaning without the words be e spoken to such who knows the meaning and intendment of them.

Fourthly, where the words themselves are incertaine, or the persons of whom they are spoken, in such case they will not be Actionable.

And first for the incertainty of the words; that is, when the scandall is not certaine and apparent in the words themselves. ve. fo. 8. & fo. 9.

Note *Reader* that all the cases put before upon the double or indifferent meaning of words are apt to this purpose. As those thou hast stollen my Apples, or my Corne, or so many load of my Furres, or a Tree, or the like, the words in these cases are not Actionable, because the scandall is not apparent and certaine by the words; for in every of these cases for ought appeares by the

words] the thing ſaid to be ſtollen might be growing, and then it is a Treſpaſſe only and no felony, and to charge a man with a Treſpaſſe, will not be actionable.

But if the words were, thou haſt ſtollen my Apples out of my Loft, my Corne out of my Barne, or my Fu z or Wood out of my Yeard, in ſuch caſe the words would be actionable, becauſe the ſcandall is apparent, for that it is evident by the words they were not growing.

Hob. Rep. p. 8. Pl. 11. *Edward Miles* brought an Action againſt *Francis Iacob* for theſe words, thou haſt poyſoned *Smith* &c. upon a Writ of Error in the Chequer Chamber it was adjudged, that the Action would not lie, becauſe it did not appeare by the words that it was done wittingly.

Hob. Rep. pa. 268. pl. 336. *Gibs* and *Jenkins* caſe to ſay of a man that he boare away money, or the like will not be Actionable.

Mich. 15. Car. in the King's Bench. *A.* ſaid of *B.* that he tooke away money from him with a ſtrong hand, for which, *B.* brought an Action, adjudged that it would not lie.

Bramſton chiefe *Juſtice* in the argueing of *Hawes* Caſe, *Mich.* 17. of this King

King in the Kings Bench, remembred this case; he did assault me and tooke away my purse from me; and hee said that it was adjudged that the words were not Actionable. The reason of these cases, is because that for ought appeares by the words (which are of themselves uncertaine) these might be Trespasses only, and no Felony. 37. Eliz. in the Common Pleas.

Againe, where the person scandalized is uncertaine, no Action will lie.

If one say (without any precedent communication of any person uncertaine) that one of the Servants of *B.* (he having divers) is a notorious Felon or Traytor, *&c.* here for the uncertainety of the person no action lyes; neither can it be made good by an (innuendo.) Coke lib. 4. fo. 17. b.

So, if one say generally I know one neere about *B.* that is a notorious theefe, or the like, no action will lie, for the same reason. Coke ibi.

So as it is in *Fleetwoods* case in *Hobarts* Reports; if a man say, looking upon three persons one of these murdered a man, no action will lie for these words by reason of the incertainety of the person, neither can an innuendo Hob. Rep. pa. 375. pl. 351.

helpe the incertainety; and note Reader that these cases are not like *Wisemans* Case.

Wiseman of *Grayes-Inne*, brought an Action against *Wiseman* of *Lincolnes-Inne* his Brother for these words, my Brother[meaning the plaintiffe]is perjured, and I will justifie it, upon not guilty pleaded, it was found for the Plaintiffe, and it was moved in arrest of judgement that the words were not certaine enough to ground an Action upon, because the Plaintiffe might have more Brothers, and it doth not appeare of which of them the words were spoaken, but it was resolved that the action would well lie, because it is alledged that they were spoken of the Plaintiffe, and the Jury have found accordingly; and here *Tanfield Justice* tooke this difference; where the words themselves are incertaine, as to say, one of my Brothers is perjured, there they can never be made good by any averrement, but where the words are certaine in themselves, so that it may appeare that the Speaker intended a person certaine, there they may bee made certaine by such a Declaration, and the finding of the Jury.

Mich. 3. in the Kings Bench.

And

And it was said that if it were true that there were divers Brothers, the Defendant should have pleaded it, and then issue should have beene taken, whether the words were spoken of the Plaintiffe or no.

Nor are the former cases like a case which I cited before *Mich.* 2. *Jac.* where an action was brought for these words; Thou diddest kill a Woman great with Childe, [*innuend. Iocosam Vxorem cujusdam R. S. defunct*] where it was ruled that though the Woman were utterly incertaine, yet because the Offence, and the party intended to commit it were certaine, the Action would well lie. Mich. 2. Iac. in the Kings Bench.

Foxcroft brought an Action against *Lacy* and declared that a communication was moved betweene *John Walter*, and *Richard Guyn* Esquiers concerning a certaine Suit, wherein the Plaintiffe and certaine others were Defendants, and that the Defendant Lacy upon the said communication in their presence, spake these words; these Defendants [meaning the Plaintiffe, and the others] are those that helped to murder *Henry Farrar* (meaning one Hob. Rep. pa. 132. pl. 118. Words certain by relation.

Hen. Farrer deceased who was murdered by one *T. Guldfield*, who was hangd for it, adjudged the words were actionable, and that they were as sufficiently layed to entitle every of the defendants to a severall Action, as if they had beene specially named, here you see the words may be sufficiently certaine by relation.

Fifthly, where former words actionable are qualified with subsequent words not Actionable, there though the former words spoaken generally, and by themselves would have maintained an Action, yet now, taking altogether, they will not bee Actionable.

Thou art a Theefe, for thou hast stolen my Apples out of my Orchard; or, for thou hast robbed my Hopground, or, for thou hast stollen a Tree; or, for thou hast stollen my Furzes; as I have put you the cases before. Or, thou art a Theefe, and thou hast stollen my apples out of my Orchard; or, and thou hast robbed my Hop ground, &c. [and] and [for] have both one and the same signification in these cases, as I have cleered it to you before to be adjudged; and in all these cases no Action will lie.

For

For [as I have said before] the latter words do qualifie the former, for the former words say him to be a Theefe, but the latter prove him to be none, I have given the reason before, because that in all these cases, the Law which will alwayes construe words the best for the Speaker, will take the Apples, Hopes &c. to be growing, and then it is Trespasse only and not Felony to take them away because felony as I have told you before] cannot bee committed of that wch is parcel of a mans inheritance as these are whilst they are growing.

Britteridge brought an Action for these words; *Britteridge* is a perjured old knave, and that is to be proved by a Stake parting the land of *H. Martin*, and *M. Wright*, adjudged that the words are not actionable, because though the former words would beare an Action, the latter do so qualifie and extenuate them, that taking altogether they are not actionable for the latter words do explaine his intent, that hee did not intend any judiciall perjury; also it was impossible that a Stake could prove him perjured, and therefore for the impossibility, and insensibility of

Cook lib. 4. fo. 19. a b.

the words the action would not lie.

Sixtly, where the words doe not import an Act, but an intent only, or an inclination to it, there such words [except where they scand all a man in his function or profession] will not beare an Action.

Coke lib. 4. fo. 19. a. b. If a man say of another that he is a seditious knave, or a theevish knave; or a traiterous knave; these words will not beare an Action; because that the words do not import that he hath done, or is guilty of Sedition, Felony, or Treason, but are Adjective words, which import an inclination to it only.

But if a man say of another that hee is a parjured knave, an Action will lie for these words, because that the Adjective [perjured] presumeth an Act committed, or otherwise hee cannot be perjured.

Coke ibi. Besides, Adjective words will beare an Action, when they scandall a man in his office, Function or Trade, by which he doth acquire his living, though they do not import an Act done.

My Lord *Coke* cites this case adjudged, 24. *Eliz.* between *Philips Parson* of *D.* and *Badby*, in an action brought for these words, *thou hast*

made

a ſeditious Sermon, and moved the people to ſedition this day: reſolved that the words were actionable, notwithſtanding that the firſt part of the words were utter adjective, and the laſt words were but a motive to ſedition, and it doth not appeare that any thing enſued; yet becauſe that they ſcandall the Plaintiffe in his function, they were adjudged actionable.

So, if a man ſay of a Merchant, that hee is a Bankruptly-Knave, or a Bankrupt Knave, theſe words will beare an action, though that the Bankrupt bee adjective. *Mich. 43. & 44. Eliz. in the common Pleas, Mittons caſe.*

Or if one ſay of a Merchant, *that he will be Bankrupt within two dayes*, which imports but an inclination, yet an action will lie; for theſe ſcandalls reach to the profeſſion. *6. E. 6. Dyer, f. 72.*

So if a man ſay of an Officer or Judge, *that hee is a corrupt Officer or Judge*, though the words be adjective yet an action lyeth for both cauſes; firſt becauſe the words touch him in his Office, and then becauſe they doe import an act done. *Cooke, lib. 4 fol. 16. a & 19. a*

Hob. Rep. pag. 12. pl. 17. Yardly, and *Ellills* caſe, to ſay of an Atorney, *that hee*

he is a bribing knave, will beare an action, though the words be adjective.

Words likewise that import an intent only, will not beare an action.

Cooke, lib. 4. fol. 16. b. Eatons case. The defendant said of the plaintiffe *for he is a brabler & a quarreller he gave his Champion counsell to make a Deed of gift of his goods to kill me &c. but God preserved mee*; The book saith, that it was strongly urged, that the action should be maintainable, and divers cases cited, which I will remember unto you.

Mic. 32. & 33. Eliz. in the Kings Bench. My Lady *Cockeins* case for these words; *My Lady* Cockein *offered to give poyson to one to kill the Child in her body*.

Another betwixt *Tibets* and *Heyne* in *Gloceſter* for these words: *Tibots and another did agree to hire one to kill B.*

Also *Cardinalls* case for these words, *if I had consented to Maſter* Cardinall, *T. H. had not beene alive.*

And the Lord *Lumleys* case; *My Lord* Lumley *hath gone about to take away my life, againſt all Chriſtian dealing*

But notwithstanding these cases, the book saith, that upon great deliberation and advisement, it was adjudged, that in the principall case the words

were

were not actionable, because that the purpose or intent of a man, without act is not punishable by the Law. My L. *Cooke* in the close of this case sayes, Note well this case, and the cause and reason of the judgment.

Certainly Reader there is somwhat more than ordinary in this (*Nota bene*) of my Lord *Cookes*; and the reason of the case seemes to intimate as much unto us; which is, that the purpose or intent of a man, without act, is not punishable by the law, which is a certain truth.

But I conceive it is as true, that where that purpose or intent is manifested by an overt act or attempt that that is punishable.

Mich. 4. of *King James* in a case in the Kings Bench, this was agreed for law; to say of a man, that hee lay in waite to assault *I. S.* with an intent to robbe him, or to murder him, an action lyes, because that hee doth accuse him of an act, *viz.* the preparation and lying in waite to assault him, but if hee had said that he would have murdered, or would have robbed *I. S.* an action would not lye, because hee only guesses at his imagination. And

Mich. 4. Jac. in the Kings Bench.

Pasch. 5. Jac. in the Kings Bench.

And in *Harris* and *Dixons* case in the Kings Bench, that case was allowed for law by *Tanfield Justice*, where hee sayd that if one say of another, that hee lay in waite to murder *I. S.* an action lyes, because such lying in waite is punishable by the law.

By this case it should seeme, that to charge a man with an attempt only to commit Felony, as to say of a man that hee offered to rob, or to poyson, or to murder I. S. that these should be actionable; for I think the like punishment is in these cases, as in the former, which I conceive is only the good behaviour, or at most indictable for it, and thereupon fined.

And if an action should lye in such case, by the same reason, to say of a man, that he is a common Quarreller, breaker, or perturber of the Peace, or that hee is a Riotter or the like would beare an action, because that for these likewise the good behaviour is grantable, and likewise a man may bee indicted for them, therefore *quare* of the former cases.

Seventhly, words which are apparently impossible, will not be actionable.

Benson

Benſon brought an action againſt *Morley* for theſe words; *Thou haſt robed the Church (innuendo Eccleſiam ſic Alhagi extra, Creplegate London) and haſt ſtolen the Leade of the Church*; Upon not guilty pleaded it was found for the plaintiffe, and it was moved in arreſt of judgement, that the words were not actionable, becauſe the Church ſhall be intended the Univerſall Church, and not any materiall Church, and the Church Militant cannot bee robbed, and ſo the words are impoſſible, but by *Popham, Chiefe Juſtice, and Tanfield Juſtice*, the action will well lie, and ſo it was adjudged, becauſe the words in this caſe cannot be intended of an inviſible Church, as is objected, but of a materiall Church, as is explained by the ſubſequent words; *and haſt ſtollen the leade of the Church*: which cannot bee underſtood of the inviſible Church. *Paſch. 5. Jac. in the Kings Bench.*

In this caſe Reader you may obſerve that it is admitted, that to ſay of a man *that hee hath robbed the Church*, generally will not bee actionable; becauſe that it ſhall be underſtood of the inviſible Univerſall Church, and ſo the words

words impossible, because that cannot be robbed.

So, I conceive to say of a man, that he hath robbed a Church will be actionable. because this must of necessity be understood of some perticular materiall Church.

Mich. 15. Car. in the Kings Bench. *Dickes* a Brewer brought an action against *Fenne* for these words; *I will give a pecke of Malt to my Mare, and leade her to the water to drinke, and shee shall pisse as good beere as Dickes doth brew*; adjudged the words were not actionable, because impossible, and therefore they could be no scandall to the plaintiffe.

Cooke lib. 4 f. 19. a. b. *Britteridge* brought an action for these words, *Britteridge is a perjured old Knave, and that is to bee proved by a stake parting the land of H. Martin, and M. Wright*, adjudged the words were not actionable because that it was impossible that a stake could prove him perjured.

Lastly, where it doth appeare that the speaking of the words could bee no dammage to the plaintiffe, there likewise no action will lye.

Cooke, l. 4. fol. 16. a The Plaintiffe shewes in his Count, that

that the defendant hath a wife yet in life, and that the defendant ſaid of the plaintiffe, *Thou haſt killed my Wife*; adjudged that the words were not actionable, becauſe that it doth appeare by the plaintiffes Declaration, that the Wife of the defendant was in life, ſo that by theſe words the Plaintiffe could not bee in any jeopardy nor ſcandaled, or damnified by them.

The like caſe was put in Sr *Thomas Holt* and *Taylors* caſe *Paſch.* 5. of *King James*; if one ſay of a woman, *That ſhe hath murdered her husband*; and ſhee and her husband bring the action, it will not lye, becauſe it doth appeare by the Record, that the ſlander is not prejuditiall. Paſch. 5. Jac. in the Kings Bench.

And as when it doth appeare by the Record that the ſpeaking of the words could be no dammage to the plaintiffe, no action will lye. So where the ſpeaking of the words might bee a dammage to the plaintiffe, yet if the ground of that damnification doe not ſufficiently appeare by the Record, the action will not lye.

A brought an action againſt *B.* for ſaying *That hee kept falſe wayes by which he did conſen, &c.* and declared that Mich. 7. Car. in the Common Pla.

that hee gained his living by buying and ſelling, but did not ſhew of what profeſſion he was; adjudged that the action would not lye, becauſe it cannot appeare (without ſhewing of his profeſſion) that the ſpeaking of the words could bee any dammage to the Plaintiffe.

Trin. 17. Car. in the Common Pleas.

A. Brought an action againſt *B.* for theſe words; *Thou haſt killed my brother [innuendo C. &c. fratrem, &c. nuper mortuum)* adjudged that the words were not actionable, becauſe the Plaintiffe did not averre, that hee was dead at the time when the words were ſpoken, and if hee were living, then the ſpeaking of the words could be no ſlander or damage to the Plaintiff

Hob. Rep. pag. 159. 2 pl. 145. pa. 265. 2 pl. 154. & pa. 261. pl. 236.

So where a man brings an action for *Welſh* words or the like which are ſcandelous, and doth not aver, or ſet forth that they were ſpoken to one who underſtood the meaning of them, the action will not lye, becauſe it doth not appeare by the Record, that the ſpeaking of the words could be any damage to the Plaintiffe. For if they were ſpoken to one that did not underſtand the meaning of them, no action would

lye

lie, because they could bee no scandall to the Plaintiffe.

And now I shall adde to the rest, only this one ground where words shall not be actionable, and that is in this case.

When a man is charged with a crime or offence by scandalous words, where it doth not appeare by the words, that he had notice or knowledge of the ground or occasion of the crime or offence in such case no Action will lie for such words.

Bridges brought an Action for those words he (*prefat Bridges innuendo*) is a maintainer of Theeves and he keepeth none but Theeves in his house, and I will prove it, upon a writte of Error in the Chequer Chamber, it was holden the words were not actionable, because he might maintaine Theeves without notice, and therefore the first Judgement was reversed.

Like the case in my Lord *Hobarts* Booke where an Action was brought against another, for saying that the Plaintiffe kept men which did robbe upon the Highway, adjudged that the words would not beare an action, because that he might keepe them and

not know them to be such persons.

Mich. 40. & 41. of the Queene in the Common Pleas.

In the case of *Reade* and *Saule* which was *Mich.* 40. *et* 41. of the Queene, this case was remembred by *Walmesley Justice*, a man brought an action in that Court for these words he [meaning the Plaintiffe] is a receiver of Theeves, and he said that in this case the Plaintiffe could have no judgement, because that he might receive Theeves, and yet not know them to be so.

Mich. 37. Car. in the Common Pleas.

A. said of *B.* that he kept false waites for which *B.* brought his action; adjudged that the action would not lie, because that it did not appeare that he did use them; and besides, for that hee might keepe false waites, and not know them to be so.

Hob. Rep. pa. 8. pl. 11.

The case of *Miles* and *Iacob* cited before is likewise to this purpose, where an action was brought for these words, thou hast poysoned *Smith*, adjudged that the words would not beare an action, because that it did not appeare that he did it wittingly.

Coke lib. 4. fo. 25.

Stanhop brought an action against *Blith* for these words; Mr. *Stanhop* hath but one Mannor, and that he hath got by swearing and forswearing, resolved that

that the words were not actionable, for this reason amongst others for that hee might recover or obtaine a Mannor, by sweaaing and forsw aring, and yet he not procuring or assenting to it.

And now I am come to the second part or clause of that generall rule layed downe before, where I am to shew you.

That scandalous words which touch or concerne a man in his Liberty will beare an Action.

By the Bookes in the Margent the Law is plaine, that if I publish and claime *B.* to be my Villeine, that in such case no action will lie, because I my selfe claime an interest in him, and the Law will not in such case punish a man; for then no man durst claime his owne for feare of an action.

2.E.4.5.
15 E.4.33
17.E.4.3.
13.H.7
Klilway
fo.16.b.
27.a.

But upon these Bookes I conceive the Law is evident, that if a man had published another to be the Villein of *I.N.* that in such case an action would have layne, because these words tend to the inslaving of him and his posterity, and to the utter deprivation of his Liberty, which the Law so much favours, for, as it is well knowne, he that was a

Villaine, he was subject both in person and estate to the will of the Lord, soe that he might seize all his Estate reall and personall and vassalise his person at pleasure, so that he did not kil or maime him.

But I conceive that at this day an action in such case will not lie, because that time and inconvenience hath quite abolished and worne out this Bondage, our Books have little upon this ground therefore I shall thus passe it over.

Scandalous words which touch or concerne a man in Member, or in any corporall punishment, will beare an Action.

Hob. Rep. pa. 258. Male &. Rets case, & 27 H. 8. 12.

A man brought an Action for calling him Theefe, and that he had stollen 2. Sheepe from *B.* the Defendant justifies the calling of him Theefe, for that the Plaintiffe did steale the Sheepe, and it was good by the whole Court, without expressing the value of the Sheepe, for if they be not worth twelve pence, so that it is but petty Larceny, and not capitall, yet it is Fellony in its nature.

By this it is evident, that to say a man hath stollen six-pence from *B.* will beare an Action, though it be but petty Larceny, because the Offender by Law may

may be impriſoned and whipt for it.

If a man ſay of another that he is perjured or that he hath forſworne himſelfe in ſuch a Court, an action will lie for theſe words. For by the Statute of 5. *Eliz.* cap. 9. A man convict of perjury forfeits 20. l. and is to have ſix Moneths impriſonment and his teſtimony taken away while that conviction ſtands; and if hee have not Goods and Chattels to the value of 20. l. then he is to be put in the Pillary, and his Eares to be nailed, ſo that you ſee here is an immediate corporall puniſhment given by this Statute, which is impriſonment. Cook lib. 5. fo. 15. & 19. Br. Action upon the caſe 104. Hob. Rep. pa. 114. pl. 107

And if a man ſay of another that hee can prove him perjured, an action will lie, though it be but an implied affirmative. See fo. 7. a. b.

Hearle againſt *Treſham* thou haſt taken a falſe Oath in the *Seſſions* of, &c. reſolved the words were actionable, for the Court ſhall intend this to bee a Court of Record, as Records of which they ought to take connſance. Hil. 1. Iac. in the Kings Bench. Hob. Rep. pa. 396. pl. 360.

Adams againſt *Flemming*, he hath forſworne himſelfe before the Counſell of the *Marches* of *Wales* in the ſuit I had

against him there for perjury; adjudged actionable.

In *Lelicke* and *VVrinckemores* case *Mich.* 7. of King *Iames* in the Kings Bench, one *Cossimans* Case was cited, which was thus, thou wast forsworne in such a Bishops Court, it was said that these words were adjudged actionable, & so it was agreed by the Court.

34. of the Queene Cossimans case.

It was moved by *Williams* in Arrest of Judgement for these words, thou art a forsworne knave, thou wast forsworne in *Ilcon* Court (innuendo the Court *Leete* there holden) it was agreed that the (innuendo) should not stretch the words further then they were spoken: And *Williams* put this case, which was in the Kings Bench, thou art a forsworne man thou wert forsworne in White Church Court, which was affirmed by all the Serjeants to be adjudged not actionable

Mich. 41. & 42. of the Queen in the Common Pleas.

Which case I conceive, cannot bee Law, because it is adjudged (as I have put the case before) that if one say of another that he hath forsworne himselfe in such a Court, that the words are Actionable, and in this case judgement was given accordingly.

Coke lib. 4 fo. 15 b. Yet quære whether the Iudges can intend this a Court of Record.

If

If a man say of a Woman that shee hath a Bastard, an action wil lie for these words, because that shee is punishable by the Statute of 18. of the Queen cap. 3. at the discretion of the Iustices, who alwayes inflict a corporall punishment upon them, as imprisonment, whipping or the like. Cooke lib. 4. fo. 17. Anne Davis's case.

Morgan and *Rookes* case *Morgan* said of the Wife of *Rookes* shee is a Bawde, and keepes a Bawdy house, adjudged that the words were Actionable, upon a writ of Error brought by *Morgan*: to reverse the judgement given in the Common Pleas, and judgement was affirmed. Trin. 16 Car. in the Kings Bench.

Chambers and his Wife against *Ryly* for the same words; *Chambers* his wife is a Bawd, and keepes a Bawdy house. Adjuded the words were Actonable, and in this case it was agreed that to say of a Woman shee is a Bawde, will not beare an Action; because shee is not punishable by the Law for it, but to say of her that shee keepes a Bawdy house, will be Actionable, for that shee is punishable by the Law for keeping a house of Bawdry. Trin: 13 Car in the Kings Bench.

A Prohibition was prayed, because

Hill. 4. Iac. in the Kings Bench.

that *Elizabeth Thorne* had Libelled in Court Christian against *Turnam* for defamation for these words, *thou art a Bawde and dost keepe a bawdy house*, and it was granted by the whole Court, because that an Action lies at Common Law for these words.

The reason why an Action lies in these cases, is, because the party may be indicted for keeping of a Bawdy house; and if shee be thereupon convicted, shee shall be imprisoned and most ignominiously Carted, which are corporall punishments.

If a man say of another that hee hath forged a Lease, Obligation, Release, or Accquittance, or the like, an Action will lie for these words: Because that by the Statute of 5. of the Queene cap. 14. there are great and grievous corporall punishments inflicted upon such offenders, if it bee to disturbe a Title, the punishment is the greater, but if onely in the cases aforesaid, the Offender is to be put in the Pillory, one of his Eares to be cut off, and to bee Imprisoned for a yeare.

Mic. 17. Car. in the Kings Bench.

Hawes brought an Action for these words; my Cousen *Hawes* hath spoken against

againſt the Booke of Common Prayer, and ſaid it is not fit to bee read in the Church. *Heath Iuſtice* was of opinion that the words were actionable, though the offence bee onely againſt a penall law, for the Statute of 1. of the *Queen cap.* 2. gives a penalty only for ſpeaking againſt the Booke of Common Prayer; but in default of payment thereof impriſonment. And hee held that all ſcandalous words, which if they were true, would make a man lyable either to a pecuniary or a corporal puniſhment, would beare an action.

But *Mallet Iuſtice*, and *Bramſton Chiefe Iuſtice* were of a contrary judgment, and their reaſon was becauſe that if this ſhould be law, it would be a great occaſion to increaſe and multiply actions for words, which the Law labours to ſuppreſſe as much as may be for then all words ſpoken of any man, which if they were true would ſubject him to a penalty, either by the Common, or the Statute Law would beare an action, as to ſay of a man that hee hath erected a Cottage, or committed a Ryot or the like, would be actionable, which the Law will not ſuffer for

for the reaſon aforeſaid, and judgment was given accordingly.

Mallet Juſtice in the arguing of this caſe ſaid, that there was an action then pending in the Common-Pleas, for calling of a man Recuſant, and hee ſaid that his opinion was, the action was not maintainable, I never heard what became of that caſe, but I conceive the Law to bee with Juſtice *Mallet*; for though there bee many penalties and forfeitures provided by Statutes againſt Recuſants, yet no corporall puniſhment is given by any of them; no not after conviction.

Hob. Rep. pa. 183. pl. 188. *Thorneton* brought an action againſt *Iobſon*, and layed that he was a Carrier, and of good ſame, and that the defendant ſaid of him, that hee was a common *Barretor*. In this caſe the booke ſayes, that the Court was of opinion, that if theſe words were ſpoken of a Juſtice of Peace, or publike Officer, or of an Attorney, or the like, that they would beare an action; by which it is evident the Court did incline againſt the action in this caſe.

Mich. 4. Iac. in the Kings Bench. In an action upon the caſe for words, the words were, *I am ſorry for thy Wife and*

and children, thou art a common Barretor, and I will indict thee for it at the next Assizes, &c. adjudged the words were not actionable, and by *Yelverton* Justice, the action will not lye for saying that, hee is a Barretor, no more then for saying that he is a Riotor, a peace breaker, or the like, and an action will not lye for saying, that a man is a Rogue.

To say of an Attorney, that hee is a Champertor, will beare an action. But I conceive upon the case aforesaid, that to say of one, who is no Attorney, Justice of Peace, nor other publike Officer that he is a Champertor, or a common maintainer of suites, will not be actionable, nor is it actionable in case of the Atorney to say that he is a common maintainer of suites.

Hob. Rep. pa. 159. pl. 145. Box and Barnabies case.

The reason of these cases may bee, because that though any man may bee indicted for being a common Barretor, Champertor, or maintainer of suites, and thereupon fined and imprisoned; yet the punishment is only the Fine, and the imprisonment as a consequent or incident thereunto.

And as it is said before in *Hawes* case

caſe, if an action ſhould lye in theſe caſes, then in all caſes, where a man ſhall charge a man with a crime or offence, for which a man might be indicted and fined, an action would lye; which would occaſion multitudes of ſuites of this nature, that the law labours ſo much to ſuppreſſe.

And now I have ſhewn you what words, which touch or concerne a man in member, or any corporell puniſhment, will beare an action. I ſhall in the next place ſhew you what words in ſuch caſe will not be actionable; and that may be in theſe caſes, either by reaſon of the doubtfull or indifferent meaning of them; or of the incertainty of the words themſelves, or of the perſons of whom they are ſpoken, or of the ſubſequent qualification of them; or upon the other grounds and reaſons which I have layd downe before.

For we muſt know (that I may ſpeak once for all) that all thoſe grounds wch are before ſet downe, where words ſhall not be actionable, which touch or concerne a mans life; will agree with all actions for words whatſoever, whe-

ther

ther that the words touch or concerne a man in corporall punishment as before; or in his Office or place of trust or in his calling or function by which he gaines his living, or the like, as is manifested likewise in part before, and shall bee more fully hereafter; but to the point, what words in this case wil not be actionable.

Box and *Barnabies* case cited before, to say of an Attorny, that he is a Champertor, will beare an action. But to say that he is a common maintainer of suites, will not beare an action, for there is maintainance lawfull and unlawfull; an Attorney may, and ought to maintaine his Clyents cause, and an Attorney may well bee said a common maintainer, because he is common to as many as will retaine him, thus you see, words of a double intendment, shall be taken best for the Speaker, for the words in this case shall not bee intended of any unlawfull maintenance, but of a lawfull maintaining of his Clyents causes. Hob. Rep. pa. 159. pl. 245.

Stanhope brought an action for these words. *Master Stanhope hath but one Manner, and that hee hath gotten by swearing*

swearing and forswearing: adjudged the words were not actionable, for this reason [amongst others] because, that for ought appeares hee might bee forsworne in ordinary communication, and not in any judiciall proceeding, which is not punishable by the Law, and where the words are of an indifferent meaning, the Law will (as is said before) take them the best for the Speaker.

Pasch: 15 Car. in the Kings Bench.

Smith brought an action for these words; *Thou art forsworne, and hast taken a false oath at* Hereford *Assizes*: by the opinion of *Ienes*, and *Bartley Iustices* [the other Justices absent] the action will not lie, because that hee might be forsworne in ordinary communication, otherwise if hee had said that he had taken a false Oath in the Assises, for there it shall be intended that he forsworne himselfe in a judiciall proceeding.

In a case that I have cited before, which was *Mich.* 41. & 42. of the Queene in the Common Pleas; this case was remembred by *Williams*, thou art, *&c.* thou wert forsworne in the Kings Bench, he said that in this case the

the Plaintiffe could have no judgement, becauſe of the double intendment of the words, for they may bee taken that he was forſworne either in the Court or the Priſon, and the beſt ſhall be taken for the Speaker, *viz.* that he was forſworne in the Priſon.

Weaver brought an Action againſt *Cariden* for theſe words, he is detected for perjury in the *Starchamber*, adjudged that the Action would not lie, becauſe that an honeſt man may be detected, but not convicted, and every one who hath a Bill of perjury exhibited there againſt him is detected, here the words do not poſitively affirme him to be perjured, and therefore not Actionable. Cooke lib. 4. fo. 16 a

Thomas brought an Action againſt *Axworth* for theſe words; *this is John Thomas his writing, he hath forged this VVarrant*; adjudged the Action would not lie. Hob. Rep. Pa. 3. pl. 4

Harvy brought an Action againſt *Duckin*, for ſaying that the Plaintiffe had forged a Writing, adjudged that the words were not Actionable, the reaſon of theſe caſes, is becauſe of the incertainty of the words, *VVarrant* Hob. Rep. pa. 36. pl.

and

and *Writing*. and as I have given you the rule before, the ſcandall muſt bee certaine and apparent in the words themſelves, otherwiſe they will not be Actionable.

By *Tanfield Juſtice* in *Wiſemans* caſe cited before, if a man ſay that one of his Brothers is perjured no Action will lie, becauſe of the incertainty.

In the caſe which I put you before, moved by *Williams*, *Mich.* 41. & 42. of the Queene in the Common Pleas, this caſe was remembred by *Walmſeley Juſtice*, one of you forged a *Subpana* out of the *Chancery*; (*innuendo* the Plaintiffe) he ſaith that judgement was ſtayed in this caſe; becauſe he which is greeved ought to be certainly defamed and the (*innuendo*) cannot make the words more certaine. here likewiſe you have examples, that where the perſon is incertaine that is ſcandaliſed, no Action will lie.

Hob. Rep. pa. 467. pl. 395.

Powell brought an Action againſt *Winde* for theſe words, *I have matter enough againſt him, for Mr.* Harley *hath found Forgery, and can prove it againſt him*: Reſolved the words were not Actionable, becauſe they were too general

generall and utterly incertaine.

Britteridges case cited before, *Britteridge* is a perjured old knave, and that it is to be proved by a stake parting the land of *H. Martin*, and Master *Wright* adjudged the words were not actionble because of the subsequent words which extenuate the former, and explaine his intent, that he did not intend any judiciall perjury, and because that it is impossible that a Stake should prove him perjured, here you have words that are not Actionable by reason of the qualification of the subsequent words, thus you may see, that the grounds formerly laid downe, may serve as a Touchstone for all cases of scandalous words. Coke lib. 4. fo. 19.

The third part of that rule or ground which I have laid downe before, and which I am now to handle is this.

That scandalous words spoken of a man, which touch or concerne a man in his Office, or Place of Trust, will beare an action.

Skinner a Marchant of London said of *Manwood* chiefe Baron that hee was a corrupt Judge, adjudged the words were actionable. Coke lib. 4. fo. 19. a. and 16. a. *Cooke*, lib. 4 fol. 16. a

Stucley a Justice of Peace brought

an Action for these words, Mr. *Stucley* covereth and hideth Felonies, and is not worthy to be a Iustice of Peace, adjudged the Action would lie, because it is against his Oath, and the Office of a Iustice of Peace and good cause to put him out of Commission and for this he may be indicted and fined.

Pasch. 7 Iac. in the Kings Bench.

Pridham and *Tuckers* case, to say of a Constable that he is a concealer of Fellons, adjudged actionable.

Trin. 36. of the Queene Rot. 223. in the Kings Bench.

Stafford Iustice of Peace brought an Action against *Poler* for these words; *William Web* being Arrested as accessory for stealing his own Goods, Master *Stafford* knowing thereof discharged the said *Web* by an agreement of 3. l. to which Master *Stafford* was party, whereof 30. s. was to be paid to Master *Stafford*, and was paid to his man by his appointment upon a VVrit of Error brought in the Chequer Chamber, it was holden the words were Actionable.

Pasch. 37. of the Queene in the Kings Bench. Rot 147.

Cotton Iustice of Peace brought an action against *Morgan* for these words, Hee hath received money of a Theefe that was apprehended and brought before him for stealing of certaine sheep;

to

to let him escape, and to keepe him from the Goale, adjudged the Action would lie.

Morris Gilbert Iustice of Peace brought an Action against *Adams* for these words; Mr. *Gilbert* hath done me wr ong in returning the Recognizance of *Podger* in 20.l. where it was taken in tenne, and the suerties in 10.l. a peece by the whole Court, the words are Actionable. Pasch. 4. Iac. in the Kings Bench. this case commenced Trin. 3: See fo. 18. a.

If a man say of a Iustice of Peace, that he is a common Barretor, Champertor, or maintainer of Suites, the words are Actionable.

Carre brought an Action against *Rande* for words, and declared that hee was Steward to divers great Lords of their Court Barrons, and of the Leetes with in their Mannors, and that he was Steward of one *A.* of his Court Barron and of the Leete within his Manor, the Defendant of this not ignorant, said these words, Mr. *Carre* hath put a presentment into the *Iuries verdict* against me of 3s. 4d. for sueing of *Peter VVest* forth of the Court contrary, &c. without the consent of the Iury by the whole Court the Action Mic. 4. Iac in the Kings Bench.

lies, because he doth accuse him of falsity in his Office; but by the better opinion if he had not alledged in his Count that he was Steward, the Action would not have layen.

Sir George Moore & Fosters case.

Sir *George Moore* brought an Action against *Foster* for scandalous words, and sets forth that he was a Iustice of Peace in the County of *Surrey*, and that there was a Suit depending in Chancery betwixt the Defendant, and one *Richard King*, and that a Commission was awarded to Sir *George Moore* and others, to examine Witnesses in the said cause, and also to heare and determine it, and that he with the others, deal't in the execution of the said Commission, and that the Defendant said of the Plaintiffe these words. Sir *George* is a corrupt man, and hath taken bribes of *Richard King*; and at another time, *King* hath set Sir *George Moore* on horseback with bribes, where by to defrande equity, Iustice and good conscience, resolved that the words were Actionable; because that though the Plaintiffe bee neither Officer nor Iudge, nor is sworne yet because it is a place of great Trust reposed by the King

King in the Plaintiffe, and for that he is punishable for bribary or corruption in the execution of the said Commission, in the Court out of which it issues notdeserving (if the words were true) to be imployed in the like Commission or any other, for these causes the words were held to be Actionable, and *Popham Chiefe Justice* in this case made no difference, where the Commission issues to one, and where to many; nor where they are nominated by the Court, where by the party, for in the first case (he said) the confidence of the Court is all one; and in the last, though that they be nominated to the Court; by the party, yet they shal not be Commissioners without the approbation of the Court.

Sir *Richard Greenefield* brought an Action against *Furnace* for these words thou (innuendo Captaine *Greenfield*) hast received money of the King to buy new Saddles, and hast cousened the King, and bought old Saddles for the Troopers. It was objected that the Action would not lie, and it was likened to these cases, which I will cite, because they are worth the knowing. Pasch. 17. Car in the Kings Bench.

8. Car. in the Kings Bench.

8. *Car.* the Major of *Tivertons* case, one said of him that the Major had cousened all his Brethren, *&c.* adjudged not Actionable.

9. Iac. in the Kings Bench.

9. *Iac.* in the Kings Bench, the Overseer of the poore hath cousened the poore of all their bread, this was likewise said to be adjudged not Actionable; but I doe some what doubt of this case, because the words doe scandall the Plaintiffe in his office of Overseer, but to this it may be said that this is an Office of burden and trouble, and not of profit.

26. of the Queene in the Kings Bench.

26. Of the Queene in the Kings Bench, *Kerby* and *Walters* case, thou art a false knave and hast cousened my two Kinsmen, adjudged the words were not Actionable.

18. of the Queene in the Kings Bench.

18. Of the Queene in the Kings Bench; Serjeant *Fenner* hath cousened me, and all my kindred, adjudged the words would not beare an Action.

See fo. 23. b. 24. a.

Out of which cases, wee may (by the way) observe this for Law; that if a man say of an other (without any precedent communication of his Office, place of Trust, or profession) that he is a accusening, or a cheating knave, or that

that he hath couſened any man thus and thus, that no Action will lie for ſuch words generally ſpoken, otherwiſe if they be ſpoken in reference to a mans Office, place of truſt, or profeſſion.

And in the principall caſe it was reſolved by *Heath Iuſtice, and Bramſton chiefe Iuſtice*, (the other Iuſtices being abſent) that the Action would lie; becauſe the words did ſcandall him in his place of Truſt, and they ſaid it was not materiall what imployment the Plaintiffe had under the King, if by the ſpeaking of theſe words, he might be in danger of looſing his Truſt or imployment.

Bray brought an Action againſt *Hayne* and declared that where he had beene Bayly to Sir *VVilliam M.* Kt. for three yeares laſt paſt of his Land in *C.* and had the ſelling of his Corne and Graine, the Defendant ſaid theſe words unto him, thou art a couſening knave, and thou haſt couſened me in ſelling falſe meaſure in my *Barley*, and the Country is bound to curſe thee for ſelling with falſe meaſures, and I will prove it, *&c.* adjudged the words were not Hob. Rep. pa. 104. pl. 93.

not Actionable, for every falsehood charged upon a man in his private dealing will not be Actionable. And in this case it doth not appeare that these words were spoken of any sale of Corn whilest he was in his Office of Bayliffe, nor of his Masters Corne, nor to the damage of his Master.

Note Reader this case agrees with the cases immediatly before

But it was agreed in this case, that if he had beene a common Rider or Badger, and had beene charged with selling false measure, it would have borne an Action; which is evident, because it is a slander to him in his function by which he gaines his living.

And my Lord *Hobart* puts this case; if a man [saith he] have a Bayliffe, to whom he commits the buying and selling of his Corne and graine, and gives him the greater wages in respect of that trust and imployment, and charges him to have deceived him in his Office, by buying and selling of false measure, to his losse or damage, this will beare an Action, because this discredits him in his Office, and may not only, because to put him out of that service, but to be refused of all others; this case is evident Reader, because the

words

words doe charge him with selling with false measure, whilst he was in his Office.

In the debate of Sir *George Moore*, and *Fosters* case before cited, these cases were put by *VVilliams Justice*, if one say of an Arbitrator that he hath done corruptly, and hath taken bribes, no Action will lie, the reason may be, because being chosen by the parties themselves, and not being sworne, such corruption is not punishable by Law, nor can the countermaunding of his power be any damage to him.

But if a man say of a Wayer in a Market or Faire appointed to way betwixt the buyer and seller, that he hath done corruptly, and hath taken bribes to make false waite, an Action lies for these words, because hee is an Officer.

Miles Fleetwood Generall Receiver of the Court of Wardes for the King, brought an Action against *Curbey* for these words; Mr. *Deceiver* hath deceived and cousened the King, and dealt falsly with him; adjudged the words were Actionable. Hob. Rep. pa. 375. pl. 351.

The like case, where one said of an Auditor

Auditor, that he was a Frauditor, was adjudged Actionable.

4. E. 6. Br. Action upon the case 112.

An Action was brought for calling of the Plaintiffe false Justice of Peace *vel his similia.* I do conceive that these words are not Actionable because, though they doe reflect upon his Office, yet they are too generall. But the Booke saith that these words (*his similia*) were ordered to be expunged or drawne out of the Booke, for the incertainty; and well they might indeed; for certainly if a man shall bring an Action against another, and shall declare that the Defendant said of the Plaintiffe that hee was a Rogue and a Theefe, or words like these, or to this effect, the Action will not lie, because the words upon the very face of the Declaration are utterly incertaine.

The *Law* affords very few Cases, (*Reader*) where words shall not be actionable that scandall a man in his office or place of trust upon those grounds which I have formerly layd downe.

But note this, that all those grounds (as I have said before) are as a touchstone for all Actions for words whatsoever, and therefore if you meet with

so and

ſcandalous words, which touch a man in his Office or place of truſt, examine them by thoſe r ules, if they be too generall or not ſufficiently poſſitive, or if of a double intendment, or doubtfull in meaning, or incertaine in themſelves, or the perſon of whom they are ſpoken, or the like. in ſuch caſes they will not be a ſ ionable, and therefore thoſe Rules ought eſpecially to be obſerved.

The fourth part of that generall rule which I have laid downe before, and which in courſe I muſt now ſpeake of, is this.

That words ſpoken of a man, which ſcandall him in his profeſſion or function by which he gaines his living, will beare an Action.

Yardleys caſe, there being a communication or diſcourſe of him in his profeſſion of *Attorney*, one ſaid that hee was a bribing knave. Hob. Rep. pa. 13. pl. 17.

Boxes caſe, one ſaid of him, being an Attorney, that he was a Champertor. Hob. Rep. pa. 359.

Byrchleys caſe an Attorney; there being ſpeech of his dealing in his profeſſion, one ſaid to him, you are well knowne to be a corrupt man, and to deale pl. 145. Coke. lib. 4. fo. 16. a.

deale corruptly adjudged in all these cases; that the words, because they scandall a man in his profession by which he doth acquire his living, were Actionable.

Hob. Rep. pa. 183. pl. 188.

So, by the opinion of the Court, in *Thornton* and *Iobsons* case cited before, to say of an Attorney that he is a common Barretor will beare an action.

Mich. 2. Iac. in the Kings Bench.

Dawtry an Attorney in the Court of *Ipswich* brought an action against *Miles* for these words; *Dawtry* is a knave and a cousening knave, and hee did take Fees of both hands in a suit betweene me and *Greene*, and by knavery suffered me to be condemned at *Ipswich* at *Greens* suit willfully being Attorney for me. The only words held considerable in this case were these; the Defendants saying that the Plaintiffe tooke Fees of both hands, and whether this would amount to as much as if he had said the Plaintiffe was an ambidexter was the question.

Popham and *Yelverton*, *Iustices* that the action would not lie, because that the words in this case may have a double intendment, for it may be intended that hee tooke Fees with both han

hands lawfully, but if he had said that he was an ambidexter, an action would lie, for this is *vox artis*, and cannot bee otherwise intended.

Fenner and Williams Justices that the Action would lie, for that the words amount to as much as *ambidexter*, and are the english of it & a direct affirmation and no Metaphor, if a man say of another that he hath the *Pox*, no Action will lie, because it shall be intended the small *Pox*; but if a man say of another that he hath beene laid of the *Pox*, there an Action will lie, because it is the phrase for the French *Pox*.

I do rather incline to the latter opinion, because (as hath beene said) these words are but the English and proper meaning of *Ambidextery*; and to construe them to a taking Fees with both hands, would be to make a construction against the expresse meaning of the words; which I conceive the Law will not permit; and the rather as this case is, because that hee doth charge him with knavery in suffering of him wilfully to be condemned in a suit, being his Attorney: I do not find any judgement in the case, therefore I shall

leave

leave it to the Judicious *Reader.*

Pasch. 24 of the Queene in the Kings Bench.

Philips Parson of *D.* brought an action against *Badby* for these words thou hast made a seditious Sermon, and moved the people to sedition this day: in this case, notwithstanding the first part of the words were utterly Adjective, and the latter were but a motive to sedition, and it doth not appeare that any thing ensued thereof; yet because they scandaled the Plaintiffe in his function, it was resolved that they were Actionable.

Cook lib. 4. fo. 19. 6 E. 6. Dyer 72.

If a man say of a Merchant that he is a Bankrupt, or that he will be a Bankrupt within two dayes, the words are actionable.

Hitt. 3. Iac. in the Kings Bench. Rot. 855.

Edmunds a Marchant brought an action against *Whetstone* for these; words He would prove that Master *Edmunds* had beene a Bankrupt, and had agreed with his Creditors for a Noble in the pound. It was moved in Arrest of judgement by *Hutcham* that the action would not lie, because that the speech referres to a time past, and though that he were once a Bankrupt, yet it may be now that he is of credit. But it was resolved that the Action would

would lie, because that it was an impeachment of his credit for if he were once a Bankrupt, every man will be the more suspitious and fearefull of him.

A Marchant brought an Action for calling of him cousening knave; by *Jones* and *Barkley*, *Justices* [the other Justices absent] the Action will not lie, because that the words are too general. But if they had touched him in his profession they would have borne an action. And therefore to call a Marchant Bankrupt, will beare an Action; but to say of a Lawyer that he is a Bankrupt, will not be Actionable, the reason may be, because that a Lawyer cannot bee a Bankrupt, for that he doth not acquire, his living by buying and selling as the Statutes speake.

Pasch. 15. Car in the Kings Bench. this agrees with the former cases see fol. 21, 2. b

Jones Iustice in the former case put this case. there being a communication of Serjant *Heale* in his profession one said of him these words, He hath undone many, adiudged that the words were actionable, because they touch him in his Profession.

Trin: 37 & 38 of the Queene in Cam. Icace. Osbeston and Stanleys case.

A. Shoomaker brought an Action against one for calling of him Bankrupt adjudged upon a Writ of Error in the Che-

Chequer Chamber, that the Action would lie.

Pasch. 15. Car. in the Kings Beech.

Axe a Dyer brought an *Action* against *Moode* for these words, thou art not worth a Groat, and averres that in such a place, where they were spoken they have the common acceptation, and are equivalent to the calling of a man a Bankrupt, resolved that the words of themselves were not *Actionable*, because that many men in their beginnings are not worth a Groat, and yet their credits are good in the world. And that the averrement was idle and could not make them actionable, because that the words have a plaine and proper significant meaning of their owne, and therefore cannot be taken in another sence or meaning.

Averrement.

Pasch. 15. Car. in the Kings Bench.

A Journeman and Foreman of a Shoomakers Shop brought an Action for these words, it is no matter who hath him, for he will cut him out of Doores; and averres that the common acceptation and intendment of these words, *inter Calceatreos*, is that he will begger his Master, and make him run away; and averres a perticular damage by the speaking of them, resolved that the Action would lie.

Averrement.

Note

Note *Reader*, here the averrement is good, becauſe the words cutting out of Doores, are of a doubtfull meaning and intendment, and ſo may be aided by an averrement, ſo that the difference betweene this and *Axes* caſe cited before, is evident.

Knightly an Attorney brought an Action againſt *Childoner* for theſe words ſpoken to his Sonne; *my Father was not caſt over the Barre as thy Father was*; the parties were at iſſue, and in this caſe *Walmeſley Iuſtice* ſaid that he conceived the words were not actionable. Trin. 41. of the Queens in the Common Pleas.

Box and *Barnabies* caſe before, the defendant ſaid of the plaintiffe being an Attorney theſe words (amongſt others which were held actionable) that hee would have him throwne over the barr the next Tearme: in this caſe (agreeing with the opinion of *Walmeſley* before) the opinion of the Court was, that theſe words were not Actionable, becauſe of the incertaine ſence and meaning of them. Hob. Rep. pa. 159.

Dickes a Brewer brought an Action againſt *Fenne*, and declares that the Defendant having communication with

some of the Customers of the Plaintiffe concerning him in his profession, said these words of him; *I will give a peck of Malt to my Mare, and lead her to the Water to drink, and shee shall pisse as good Beere as Dicks doth brew*; adjudged the words were not Actionable, because that they are Comparative only; and besides they are impossible, and therefore, they can bee no scandall to the Plaintiffe.

In this case, it was said by *Rolls* Serjeant that it had beene adjudged Actionable, to say of a Brewer that hee brewes naughty Beere; which was agreed by the Court, because that he is presentable in a Leete for it.

And likewise in this case it was said by *Bartley Justice* that where one said of a Lawyer, that hee had as much Law as a Munkey, that these words were adjudged not actionable because that he hath as much Law & more also then the Monkey hath, but if hee had said that he had more Law then a Monkey, these words would be actionable.

One said of a Counseller at Law, that he was a Concealer of the Law adjudged actionable.

Sanderson

Sanderſon and *Rudds* caſe the Plaintiffe being a Lawyer and ſtanding for the Stuardſhip of a Corporation, the Defendant ſaid of him that he was an ignorant man; the Court in this caſe inclined that the words were *Actionable*. Trin. 17. Car. in the Common Pleas.

Snag a Counceller at Law brought an *Action* againſt *Peter Gray* for theſe words; *Goe yee to him to be of your counſell, he will deceive you, he was of Counſell with me, and revealed the ſecrets of my Cauſe.* Adjudged the words were actionable, becauſe that this cannot be intended of a Lawfull revealing to the Judge by way of motion before whom it was tried, for this were a commendation for him, but the words are to be taken as they were ſpoken, that is, *conjunctim*, and *uno halitu*, and then his intention appeares contrary, for he ſaid before, He will deceive you, *&c.* Alſo the Plaintiffe declared that they were ſpoken *Malitioſe*: And theſe words revealed the ſecrets, *&c.* are to be intended revealed to thoſe from whom they ought to be concealed, and every man is to make the beſt of his cauſe, and therefore *ſecreta ſua non ſunt revelanda*; Trin. 13. of the Queene in the Kniges Bench. Rot. 114. Cokes Entries fo. 222 a. b.

and also the words touch the Plaintiffe in his Art and Science, which requiers men of great trust & confidence, and so the words before being spoken in derogation of the confidence and fidelity of the Plaintiffe, are a great slander to him; for these causes judgement was given for the Plaintiffe.

Vpon this case I do conceive, that to say of a Lawyer generally that hee revealed the secrets of his Clyents cause will beare an Action.

Pasch. 12. Car. in the Kings Bench. One said of a Doctor of Phisick that he was a Mountebanke an Empericke, and a base fellow; adjudged the words were Actionable.

Pasch. 17. Car. in the Common Pleas. *Paine* brought an Action upon the case for words, and shewed how that he was a Farmer and used to sow his land, and to sell the Corne upon it, and by this *per majorem partem* he maintained his Family: and that the Defendant said these words of him, He keepes a false Bushell by which hee doth cheat and couzen the poore, and averres the losse of his custome by the speaking of these words. In this case it was moved by *Gotbolt Serjeant* in Arrest of Judgement that the words were not acti-

Actionable, becauſe it doth not appeare that the Plaintiffe kept a falſe Buſhell *Scienter*, knowing it to be falſe.

But it was reſolved that the words were Actionable, for (as this caſe is) it muſt of neceſſity be taken that hee kept a falſe Buſhell, knowing it to bee falſe, for otherwiſe it could be no conſenedge.

And this caſe plainly differs from the caſe where an Action was brought for ſaying that the Plaintiffe kept falſe Waites generally, without further ſaying in this caſe the words were adjudged not Actionable, becauſe that it doth not appeare that he uſed them, or knew them to be falſe.

Hill. 6. of the Queene in the Common Pleas adjudged and after affirmed in a Writ of Error, Mich. 26. & 27. of the Queene in the Kings Bench. Rot. 35.

The fifte part of that Generall Rule, which I have laid downe before, and which now I am in courſe to ſpeake of, is this. *That words ſpoken in ſcandall of a mans Title, or which tend to a mans diſinheritance, will beare an Action.*

Henry Mildmay brought an Action againſt *Roger Standiſh* for ſaying and publiſhing that certaine Land was lawfully aſſured to one *Iohn Talbot* & *Oliffe* his Wife for a 1000. yeares, and that they of the intereſt of the tearme were

lawfully ipoſſeſſed, whereas in truth there was no ſuch matter, and ſo for ſlandring of the Eſtate and Title conveyed to his Wife by certaine Indentures, and ſhewed all in certaine, and how hee was prejudiced by the ſaid words, he brought the ſaid action.

The defendant pleaded a Proviſo in the ſame Indentures, and the ſaid limitation for 1000 yeares, according to the ſaid Proviſo, as he pretended (whereas in trueth the ſaid limitation was void in Law) by force of which he ſaith that the ſaid *Oliffe* had an intereſt for a 1000 yeares, and ſo juſtified the words, upon which the plaintiffe demurred: adjudged that the action would well lie; though that the ſaid *Iohn Talbot* and *Oliffe* his wife had ſuch a limitation *de facto* for a 1000 yeares, which occaſioned the defendant being unlearned in the lawe ſo to publiſh it, yet for that he hath taken upon himſelfe notice of the lawe, and medled in that which did not concerne him, and hath affirmed and publiſhed that *Oliffe* had a good eſtate for a 1000 yeares in ſlander of the Title of the plaintiffe and to his preiudice, for this

ca uſe

cause judgment was given for the plaintiffe.

Sir *Thomas Gresham* Knight brought an action against *Robert Gunsley* Clark, and shewes how his father was seised of divers Mannors and lands: and amongst them of the Mannor of Tittesey, which he did by his will amongst other lands devise to *Beatrice* his wife for life, the remainder to the plaintiffe and the heires males of his body begotten, and had issue *William Gresham* his eldest sonne, and the plaintiffe the younger, and dyed, and that *William* after his death confirmed to *Thomas* his estate, and that *Beatrice* died, and the plaintiffe entred into the said Manour of Tittesey. and further shewes that *William* had issue *Elizabeth* his heire apparent, and that the plaintiffe had a wife and sonnes and daughters; and that he had an intent to conveye some of his lands to his wife for her ioynture, and some to his sonnes and daughters for their advancement and to exchange parcell with others, and to make a lease of an other parte, but doth not shew to whom, and that the defendant *premissorum non ignarus* in de-

Hill. 3. Iac Rot. 519. B.R. Cookes Entries f 35. a.

rogation of the Title and eſtate of the plaintiffe, ſaid theſe words to the plaintiffe. As I before ſaid to your Wife, I ſay now that your brother was a foole and never borne to doe himſelfe any good, for that he could not hould his hands from ratefying and ſubſcribing to his Fathers will: bnt yet notwithſtanding I have that to ſhew in my houſe that if his heire doe not any ſuch Act as hee hath done, it ſhall bring her to inherit Titteſey, by which words he ſaith, that hee was hindred in the conveyances aforeſaid.

In this caſe it was reſolved that the Action would not lie, firſt becauſe that the words themſelves are not ſcandalous to the Title of the plaintiffe: the words conſiderable are onely theſe, that he had that in his houſe, &c. that ſhall bring her [that is the Daughter and Heire of *William*] to inherit *Titteſey*; which is apparently feaſible, for the Plaintiffe being Donee in Taile of the guift of his Father, the Daughter and Heire of the eldeſt Brother is inheritable to the Revertion in Fee; and ſo no prejudice to the Plaintiffe, to ſay he hath that which ſhall bring her to inherit.

Beſides

Besides the action will not lie, because that he doth not shew any special damnification by the speakeing of these words as that he was upon a sale of these lands to I. S. who by reason of the speaking of these words refused to buy them, or the like; and in this case, here was nothing but a purpose or intent of conveying some of these lands.

And *Popham Iustice* said, that there is a difference when a man declares his opinion of the Title of another to land this is nothing, and he shall not be punished for it, but if he doth so publish it, that it comes to the hearing of any one that intended to buy the Land in such case an Action lies, but he must shew specially in his Count in what he was damnified, otherwise the Action will not lie.

Banister brought an Action against *Banister* for that the Defendant said of the Plaintiffe (being Sonne and Heire to his Father) that he was a Bastard, resolved that the Action would lie, for this tends to his disinherision of the Land which discends to him from his Father. Trin. 25 of the Queene in the Kings Bench.

But in this case it was resolved, that if

if the Defendant pretend that the plaintiffe was a Baſtard, and that he himſelfe was next heire, there no Action lies.

So if a man ſay that another hath noe right to land, an *Action* lies; but if a Counſeller ſay that his Client hath the better right, this will not beare an Action.

Mich. 3. Jac. in the Kings Bench *per Curiam*, if one ſay to me that I am a Baſtard, if I have Land by diſcent, I ſhall have an *Action* upon the caſe, and though that I have Land by diſcent, and this tends to my diſinheritance, if I ſue in Court Chriſtian for it, a Prohibition lies, becauſe that the tryall there may be to my diſinheritance.

And if one ſay to another that hee is baſe borne, an action will not lie, for the words ſhall be taken in *meliori ſenſu*. And if one ſay to his Sonne that he is a Baſtard, or a Leaper, hee ſhall not have an action neither in Court Chriſtian, nor at Common Law.

Coke lib. 4. fo. 18. Sir *Gilbert Gerrard* brought an action againſt *Mary Dickinſon*, and declares how that he was ſeiſed of certaine lands in Fee, and that hee was in communication to demiſe them to

Kal,

Ralph Egerton for 22. yeares for 200.l. Fine and a 100.l. rent *per annum*, and that the Defendant (*premissorum non ignara*) ſaid, I have a Leaſe of the Mannor and Caſtle of *H.* (which was the ſame lands) for ninety yeares, and ſhewed and publiſhed it, *&c.* by reaſon of which words (he ſaith) the ſaid *Ralph Egerton* did not proceed to accept the Leaſe *&c.*

In this caſe it was reſolved, that no Action would lie for the ſaid words, though they were falſe, becauſe that the Defendant pretended an intereſt in the ſaid land.

So if the Defendant had affirmed and publiſhed that the Plaintiffe had not any right to the ſaid Land, but that ſhe her ſelfe had right to it, in this caſe becauſe that the Defendant pretends title to it though, that in truth, ſhee hath not any, yet no Action lies. For if in ſuch caſe an Action ſhould lie, how could any one make claime or title to any land, or commence any ſuit or ſeeke adviſe and Counſell, but hee ſhould be ſubject to an Action; which would be very inconvenient.

Agreeing with theſe caſes, in 2. *E.* 4. 2.E.4.5. and 15.E.4.32

and 15.E.4. it is resolved that no action upon the case lies against one for publishing another to be his Villeine.

The sixt part of that generall Rule which I have laid downe before; and am now to speake of is this.

That scandalous words which tend to the hinderance or losse of a mans advancement or preferrement, or which cause any particular damage, will beare an Action.

Coke lib. 4.fo. 16. b. *Anne Davies* brought an Action against *Gardiner* for these words, spoken to one *B.* a Suiter to the Plaintiffe and with whom a marriage was almost concluded. I know *Davies* Daughter well, shee did dwell in Cheape side, and a Grocer did get her with Childe, &c and shee saith that by reason of the speaking of these words, the said *B.* utterly refused to take her to Wife, so that thereby she lost her advancement, &c. adjudged that the Action would lie, because that if shee had a Bastard she was punishable by the Statute of 18. of the Queene cap. 3.

But it was in this case further resolved, that if the defendant had charged the Plaintiffe with bare incontinency only

only yet the Action would have laine, by reaſon that by the ſaid ſlander ſhee was defeated of her advancement in Marriage.

And it was in this caſe likewiſe reſolved, that if a Divine be to bee preſented to a Benefice, and one, to defeat him of it, ſaith to the Patron that he is a Heretique or a *Baſtard*, or that he is excommunicated, by which the Patron refuſes to preſent him (as he well might, if thoſe imputations were true) and he loſes his preferrement, that in this caſe an Action will lie.

Dame Morriſon Widdow brought an Action againſt *William Cade* Eſquier and declares that ſhee was of good fame, &c. And that *Henry Earle* of *Kent* was in ſpeech and communication with her for marriage, the Defendant *premiſſorum non ignarus*, ſaid theſe words, *Arſcot* hath reported that hee had the uſe of the Lady *Morriſons* body at his pleaſure; *ubi revera Arſcot* never reported it, and alledged that the Earle of *Kent* upon the hearing of the words ſurceaſed his ſuit by which ſhe loſt her advancement, *&c.* upon not guilty pleaded it was found for the Plaintiffe, & in this

Hil. 4. Iac. in the Kings Bench. Rot. 1153

this caſe it was reſolved, that though the words charge the Plaintiffe with bare incontinency only, which is an offence Eccleſiaſticall, and not civill; nor puniſhable by our Law, yet becauſe of the temporall damage, *viz.* the loſſe of her advancement in marriage, the Action would well lie, which agrees with the judgement in *An Davies* caſe.

Trin. 17. Car. in the Common Pleas.

Sanderſon and *Rudds* caſe cited before; the Plaintiffe being a Lawyer, ſtood for the Stewardſhip of a Corporation, and the Corporation being aſſembled to elect a Steward, the plaintiffe was motioned to them, whereupon the Defendant being one of the corporation, ſaid to his Brothers, he is an ignorant man, and not fit for the place; and the Plaintiffe ſes that by reaſon of theſe words, they did refuſe to elect him Steward, ſo that he thereby loſt his preferrement, &c. the Court in this caſe inclined that the Action would lie.

And now I am fallen upon a queſtion very neceſſary to be reſolved, and that is.

What words are Actionable of themſelves only? and what are not Actionable,

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without alledgeing of a particular damage; I take this for a Rule, that ſcandalous words which touch or concerne a man in life, liberty, or Member, or any corporall puniſhment, or which ſcandall a man in his office or place of truſt or in his calling or function, by which he gaines his living, or which charge him with any great infectious diſeaſe, by reaſon of which hee ought to ſeperate himſelfe, or to be ſeperated by the Law from the ſociety of Men; all ſuch words will beare an Action, without averring or alledging of any particular damage by the ſpeaking of them.

Yet I do not deny, but that it is beſt to alledge a particular damage, if the caſe will beare it; and it is uſuall ſo to doe in theſe caſes, for the increaſe of damages.

Bramſton chiefe Juſtice in the arguing of *Hawes* caſe which I remembred before tooke this for a Rule, that if words did import a ſcandall of themſelves, by which damage might accrue, in ſuch caſe the words would beare an Action, without alledgeing of a particular damage. Mic. 17. Car. in the Kings Bench.

But now on the other ſide, words which doe not touch or concerne a man in any

of

of the cases aforesaid, will not beare an Action, without alledgeing of a particular damage."

Words spoken in scandall of a mans Title will not beare an Action; without averring of a particular damage, as appeares by the cases before cited upon that ground.

Cook lib. 4. fo. 15. b

There are many words, which are words of passion and choler only, as to say of a man that he is forsworne Generally, or that he is a villain, or a rogue or a varlet, or the like, these words are not Actionable of themselves; yet I doe conceive that in these cases an Action will lie with an Averrement of a particular damage by reason of the speaking of them.

Averrement.

Cooke, lib. 4 fol. 17. a & fo. 20. a. 27. H. 8. 14 the Register fo. 54.

There are other words which concerne matter meerely Spirituall, and determinable in the Ecclesiasticall Court only; as for calling of a man a Bastard a Heretique, a Scismatique, an Advowterer, a Fornicator, or for calling of a Woman a Whore or charging her with any particular act of incontinency, or the like, yet in these cases with an averrement of a particular damage, an Action will lie at the Common Law

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as it is adjudged in *Anne Davies* case cited before.

By Popham Chiefe Justice if one say of a Woman that is an Inholder, that she hath a great infectious disease, by which she loses her guests, an Action will lie, this must bee taken with an averrement of that particular damage; otherwise an Action will not lie, unlesse the disease be such, for which shee ought to separate her selfe, or to be seperated by the Law from common society, as I shall shew you hereafter. Cook lib. 4. fo. 17. a

Axe and *Moods* case cited before, the Plaintiffe being a Dyer brought an Action for these words, thou art not worth a Groate, adjudged that the words were not Actionable, because that many man in his beginning is not worth a Groat, and yet hath good credit with the world. Pasch. 15. Car. in the King's Bench.

But in this case it was agreed that if the Plaintiffe had averred specially that he was thereby damnified, and had lost his credit so that none would trust him with such an averrement the Action would have layen. Pasch. 15. Car. in the Kings Bench.

In the case of the Foreman of a Shoomakers Shop cited before, for

theſe words; it is no matter who hath him, for he will cut him out of doores, the Plaintiffe avetred that the Common acceptation of theſe words, *inter Calceareos* is, that he will begger his Maſter, and make him run away; and ſhewed a ſpeciall damage by the ſpeaking of theſe words, and it was adjuged that the Action would lie, which I conceive was only for the particular damage, for to ſay of a Servant that he doth Cheate, Couſen or defraud; or that he will begger his Maſter, or the like, will not beare an Action, without an averrement of a particular damage.

And in this caſe it was ſaid by the Court that for ſome words an Action will lie, without an averrement of any particular damage, as for calling of a man Theefe, Traytor, or the like, and ſome words will not beare an Action, without an averrement of a particular damage.

As if a man ſhall ſay of another that he kept his Wife baſely, and ſtarved her, theſe words of themſelves will not beare an Action; but if the party of whom they were ſpoken, were to bee maried to another, and by theſe words

is

is hindered; in such case, with an averrement of the particular damage, an Action will lie.

So likewise in the case of *Dickes* and *Fenne* which I also cited before, where one said of the Plaintiffe being a Brewer, that he would give a peck of Malte to his Mare, and lead her to the water to drink, and she should pisse as good Beere as the Plaintiffe brewed; it was resolved that the words themselves were not Actionable, because of the impossibility of them. But it was agreed by the Court, that if there had beene a speciall damage alledged as losse of Custome or the like, the Action would have laien. Mic. 15. Car. in the Kings Bench.

Hawes case cited likewise before, one said of him, that he had spoaken against the Booke of Common Prayer and said that it was not fit to bee read in the Church for which he brought his action, and shewed how that by reason of the speaking of these words by the Defendant, he was cited in to the Ecclesiasticall Court and had paid and expended severall summes, *&c.* adjudged that the words themselves were not Actionable, because if they had beene true, Mich. 15. Car. in the Kings Bench.

they charge him only with an offence against a penall Law, which doth not inflict corporall punishment, but for non payment of the penalty.

But it was resolved that for the particular damage the Action would lie, and of this opinion were *Heath* and *Mallet Justices.*

But *Bramston Chiefe Justice*, (the other Justice being absent) was of a contrary judgement, and hee tooke this for a Rule, that if the words did not import a scandall in themselves (as Hee conceived they did not in this case) in such case the averrement of a particular damage should not make them Actionable.

But with all due respect to the judgement of this learned Judge, I doe conceive that the words are in themselves scandalous; because that they do charge a Man with faction and opposition to established Law, and settled Government.

But if they were not in themselves scandalous, yet I conceive (according to the judgement of those reverent Judges) that for the dammage only the Action will lie, for otherwise the Plaintiffe

tiffe ſhall ſuffer through the default of the Defendant, and be without remedy, which I conceive the Law will not permit; but I ſubmit this to the judgement of the learned *Reader.*

Laſtly, words which charge a man with any dangerous infections diſeaſe, by reaſon of which he ought to ſeperate himſelfe, or to be ſeperated by the Law, from the ſociety of men, will beare an Action. Coke lib. 4. fo. 17.

If a man ſay of another that hee hath the French Pox, an Action will lie.

Taylor brought an Action againſt *Packins* for theſe words, thou art not worthy to come into any honeſt mans company, thou art a Leaprous knave, and a Leaper. Adjudged that the words are Actionable, becauſe that it is cauſe of ſeperation by the Law of God and Man. Hill. 4. Iac. in the Kings Bench.

So by *Tanfield Juſtice* to ſay that one is infected with the French Pox, will beare an Action, but to ſay that one hath the falling Sickneſſe, is not Actionable, except that it diſables him in his profeſſion, as to ſay that a Lawyer hath the falling Sickneſſe, an Action lieth, becauſe that it diſableth him for his buſineſſe.

Vpon this ground I conceive, to say of a man that hee is infected with the Plague, will beare an Action, because this also is a dangerous infectious disease, and a cause of separation.

I have now finished my task of shewing you what words are Actionable in the Law, and what not. And yet Reader I shall not end this Treatise here, for there are many things not worthy the knowing (which I could not aptly introduce before) and therefore not to be omitted.

There are two things or grounds very remarkable in all Actions upon the case for words.

First Causa dicendi, the ground or occasion of the speaking of the words: And that must be collected out of the precedent discourse or communication concerning the Plaintiffe; or else out of the relation that the words themselves have to the Defendant, or otherwise, as the case shall fall out to be.

The next thing is the affection of the Speaker, that is to say, whether the words were spoken Ex malitia, or not?

First, for the first, *Causa dicendi*, the ground or occasion of speaking of the words. And

And here I shall lay downe this as a ground, *that scandalous words which of themselves singly would beare an action, yet being joyned to other words or discourse, and so Causa dicendi, or the subject matter being considered, they will not beare an Action.* For *Sensus verborum ex causa dicendi accipiendus est*, &c. And words must ever be construed according to the subject matter. Coke lib. 4. fo. 13. b

Henry Lord *Cromwell* brought an Action *de Scandalis Magnatum* against *Edmund Denny*, Vicar of N. in the County of *Norfolke*, &c. for these words: It is no marvill that you like not of me, for you like of those that maintaine sedition against the Queens proceedings; the Defendant pleaded a speciall justification, in effect thus; that the Defendant being Vicar of N. the Plaintiffe procured I. T. and I. P. to preach there, who in their Sermons enveyed against the Booke of Common Prayer, and affirmed it to bee superstitious; wherefore the Defendant inhibited them, for they had no licence nor authority to preach, yet they proceeded through the encouragement of the Plaintiffe, and the Plaintiffe said Coke ubi supra.

to the Defendant, Thou art a falſe varlet I like not of thee; to whom the Defendant ſaid, It is no marvill though you like not of me, for you like of thoſe (meaning the aforeſaid I. T. and I. D.) that maintaine ſedition [meaning that ſeditious Doctrin] againſt the Queens proceedings.

In this caſe it was adjudged that the juſtification was good. For though that in this caſe, taking the words ſingly of themſelves as the Plaintiffe hath declared, they might have beene Actionable; becauſe that then they could not be conſtrued otherwiſe then of a publike and violent ſedition, as the word it ſelfe doth import.

Yet now the ground and occaſion of the words appearing, by which it is evident, that the defendant did not intend any publike or violent ſedition, but only that ſeditious Doctrine againſt the proceedings of the Queene, *viz.* the Statute *de anno primo*, by which the Common Prayer was eſtabliſhed, and God forbid [ſaith the Booke] that words by a ſtrict and Grammaticall conſtruction ſhould be taken contrary to the manifeſt intent of the Speaker, there

therefore it was ruled upon the coherence of all the words, that the justification was good and so the words not Actionable.

And in this case it was ruled, that if a man bring an Action against another, for calling of him murderer, and the Defendant will say that hee was speaking with the Plaintiffe of unlawfull hunting, and that the Plaintiffe confessed that he had killed divers Hares with certaine Engines, to whom the Defendant answered and said, Thou art a murtherer [meaning the killing of the said Hares] that this was a good justification, and so upon the whole matter the words not Actionable.

Byrchley an Attorney brought an Action against one for these words; you are well knowne to bee a corrupt man, and to deale corruptly: resolved that the words were Actionable, but in this case it was ruled that if the precedent speech had beene that *Byrchley* was a Vsurer, or that he was Executor of another, and would not performe the testament, and upon this the Defendant had said these words, upon a speciall justification, as aforesaid, they would

Coke lib. 4. fo. 16. a.

would not beare an Action.

Coke 1ib. 4.fol.17.a

Banister and *Banisters* case resolved that if I call an heire a Bastard, an action will lie, but if the defendant pretend that the plaintiffe is a Bastard and that he is next heire, there no Action will lie. The reason of this is plaine, because *causa dicendi*, or the occasion of speaking of these words, is not to defame the Title of the plaintiffe, but only to justifie the Title of the defendant, and it is lawfull for any one to speak in justification of his owne Title, though hee do thereby seeme to slander the Title of another man, agreeing with this case is *Gilbert Gerrards* case cited before.

See fo.26: b.17.a

Pasch. 15. Car. in the Kings Bench.

Molton brought an Action against *Clapham* and declares how that there being a cause pending in this Court betwixt the plaintiffe and defendant, upon reading of certaine Affidavids of the plaintiffes in Court, the Defendant said openly in *presentia & auditu Justiciariorum & juris peritorum*, &c. There is not a word true in the Affidavids, which I will prove by forty witnesses: and alledges that the words were spoken *malitiose*.

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yet it was resolved by the Court that they were not Actionable, because as they are usuall words upon the like occasion; so they are spoken in the defence of the defendants cause, and this case was likened to the case of the Bastard immediatly before.

And *Bartley Justice* said that there are two things mainely considerable in words, the words themselves, and *causa dicendi*; and therefore somtimes though the words themselves would beare an Action yet *causa dicendi* being considered, they will not be Actionable, as in this case.

Now as my Lord *Cooke* ses in *Cromwels* case before remembred, so I say to you. In these cases, *Reader*, you may take notice of an excellent point of learning in Actions for slander; to observe the cause and occasion of speaking of them, and how this may bee pleaded in excuse of the Defendant. Coke lib. 4. fo. 14. a.

But before I passe this, *Reader*, I shall observe unto you that the defendant in these cases might take the generall issue, if he would, *viz.* that he is not guilty *modo & forma*, as the Plaintiffe hath alledged, and so give in evidence Coke lib. 4. fo. 13. b. 14. a

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the coherence and connection of the words, and the occasion of speaking of them, and have them specially found, if it be conceived to be necessary.

Or the defendant may [as the case shall require] justifie the speaking of other words, and traverse the speaking of the words in question; and so likewise upon the evidence have the words specially found.

And hereupon; *where the speciall finding of the Jury will warrant the Declaration of the Plaintiffe, and maintaine the action, and where not? may be very questionable, and worthy the knowing.*

The Defendants plea is that wch must guid us in these cases, if hee plead not guilty, the words are [as I have said before] *modo & forma* as the plaintiffe hath alledged, and if he justifie the speaking of other words, and traverse the words in question, he doth it thus, *absque hoc*, that he spake the words in the Declaration *modo & forma* as the plaintiffe hath alledged.

Now where the words that are founde by the Iury shall bee said to agree *modo & forma* with the words in the Declaration, this is the question, here

here I ſhall lay down this as a ground.

That where the words that are found do not agree with the Declaration in the ſubſtantiall and eſſentiall forme, that in ſuch caſe, they do not warrant the Declaration. But if they do agree in the ſubſtantiall and eſſentiall forme, though they agree not in every word, yet they doe well warrant the Declaration, and by conſequence maintaine the Action.

Sydenham againſt *Man* for theſe words; If Sir *John Sydenham* might have his will, he would kill all the true Subjects in *England*, and the King too, and he is a maintainer of Papiſtry and rebellious perſons. The defendant pleaded other words, and traverſed the ſpeaking of the words *modo & forma, &c.* the Iury found that he ſpoak theſe words, viz. I think in my conſcience, that if Sir *John Sydenham* might have his will, he would kill, *&c.* and find all the ſubſequent words before Alledged, and whether the Defendant were Guilty of ſpeaking of the words in the manner and forme as they are Alleadged by the Plaintiffe in his Declaration, was the Queſtion reſolved againſt the Defendant. Hob. Rep. pa. 252. pl. 313.

And

And upon a Writ of Error in the Chequer Chamber, the Court alſo inclined againſt the defendant, for the matter is in effect the ſame, and the forme muſt be underſtood the eſſentiall forme, not according to every word, here you have the ground laid downe before.

Yet the Booke ſaith that Paſch. 16. though the Court inclined that either of the words would beare an Action, yet it was agreed that the words were not found ſo abſolute as the Declaration, neither moved credit in, the eare ſo fully, which is the force of a ſlander; and then they are not the ſame words in force and effect, as if the words were laid, I know him to be a Theefe, and it were found, I thinke him to bee a Theefe.

For my part *Reader*, I doubt in this caſe whether the finding of the Jury do warrant the Declaration, becauſe they are not the ſame words in force and effect (as is ſaid before) And I conceive they are not the ſame in the eſſentiall forme of them, for I queſtion, (as I have don before) if a man ſhould ſay of another, that he doth think if he might have his will, he would kill all

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the Kings true Subjects, and the King too; or that he doth think such a one to be a Theefe, whether these words be Actionable or no, because the words are no positive charge, but only the thought or opinion of the Defendant.

But to this it may bee said that if such words as these should not be actionable, this would open a gap for scandalous Tongues to slander a man at pleasure, and yet no Action lie, which were very mischievous. therefore I shall leave it to the judgement of the *Reader*.

Fenner against *Mutton* in an action upon the case for words, which were thus; *Nicholas Fenner* procured 8. or 10. of his neighbours to perjure themselves, the defendant pleaded not guilty; and the Iury find that the defendant said that *Nicholas Fenner* had caused 8. or 10. of his Neighbours to perjure themselves, and if this Verdict were found for the Plaintiffe, or the defendant, was the question, and the doubt was whether this word (cause) amount to as much as procure. *Tanfield Iustice* seemeth that it doth not, for hee might be a remote cause, as *causa sine qua non*, and

Mich. 4. Iac. in the Kings Bench.

and yet no procurer, as if a Notary writ a writing, and put to this a seale, and another take it and forge and publish it, the writer was the cause that this was forged, and yet no procurer of it. I find no judgement in this case, therefore quære of it.

Hil:3. Iac in the Kings Bench.

Chipsam against *Leeke* for these words *Chipsam* is a Theefe, for he hath stollen a Lambe from A. and *Geese* from B. and killed them in my ground, issue was joyned whether the Defendant spoake the words *modo & forma, &c.* the Jury find that the defendant said that the plaintiffe was a Theefe, for hee hath stollen a Lambe from A. and killed it in my ground, but they find that hee spoake nothing of the Geese, yet it was resolved that the finding of the Jury did well warrant the Declaration of the plaintiffe, because that the substance of the words is, that he is a Theefe, and thee for hee hath, &c. only a demonstration in what he is a Theefe, which is as well in stealing of the Lambe, as of the Geese, and then if it bee found that he said any of them, it sufficeth, and judgement was given for the plaintiffe.

Norma

Norman and *Symons* case, the plaintiffe brought an Action for words and declared that they were spoaken *falso & malitiosè*; the Iury find the words spoaken *falso & injuriosè* and it was adjudged that the Action would not lie, because the finding of the Jury doth not warrant the Declaration in the substantiall forme of it; for if the words were not spoaken out of malice, they will not be Actionable, as I shall shew you hereafter. Trin. 7. Car. in the Kings Bench.

Brugis brought an Action for these words, *Brugis* is a maintainer of theeves and a strong Theefe himselfe, issue was joyned whether the Defendant spoake the words *modo & formâ*, and the Iury found all the words except the word [strong] and in this case the Plaintiffe had judgement. 6. E. 6. Dyer fo. 75. fol. 21.

Here we may observe that though every word alledged in the Declaration be not found, yet the essentiall and substantiall forme of the words being found, that is sufficient to maintaine the Declaration. This I say you may observe not only by this case, but the cases also before put.

Barbar brought an Action against

Hawley for these words *John Barbar* and his Children be false Theeves, men cannot have their Cattell going upon the Commen, but they will kill them, and eat them, &c. issue was joyned whether the Defendant spoake the words *modo & forma*, and the Iury found that he spoak these words, viz. Men cannot have their Cattell going upon the Common, but *John Barbar* and his Children will kill them with *Barbars* Doggs, in this case it was adjudged for the Defendant.

The reason is plaine, because the words found by the Iury do vary in the essentiall and substantiall forme, from the words in the Declaration. For the words in the Declaration do charge the Plaintiffe with Theft, for which an Action would lie, but the words found by the Iury charg him only with trespasse, for which no Action will lie, I have sufficiently proved the ground laid downe before, and therefore I shall now proceed to the second thing [which I have touched before] very considerable in all Actions for words, and that is.

Quo animo, with what affection the words

words are ſpoken, whether ex malitia *or not? for if it do appeare that they were not ſpoken out of malice, they will not be actionable.*

Ralph Brook, York Harrauld brought an Action againſt *Henry Mountague*, Knight, Recorder of *London* for ſaying of the Plaintiffe that he had committed Felony. The Defendant pleaded how that he was a Counſeller and earned in the Law and that he was retained of Counſell againſt the Plaintiffe at ſuch a Tryall, and ſet forth all the matter in certaine, and that hee in giving evidence to the Jury ſpoake the words in the Count (which words were pertinent to the matter in iſſue) in this caſe it was reſolved that the Action would not lie, becauſe that the words were not ſpoken out of malice; for that they were ſpoken to the purpoſe, and being to the purpoſe, though the words were falſe, no Action will lie againſt the Defendant. Mich 3. Iac. in the Kings Bench.

As in an Appeale of Murder, if the Counſell with the Plaintiffe ſaith that the Defendant committed the murder, though it be not true, yet he ſhall not be puniſhed for it, becauſe that what he

said was pertinent, so that it cannot be taken to be spoken out of malice, but only as of Counsell for the Plaintiffe.

But if that which he saith be impertinent, in scandall of him against whom he speaks it, as in Trespasse of battery to say that the Defendant is a Felon, there an Action will lie, for that they cannot be otherwise taken, but to bee spoken out of malice.

And in this case it was further said, that if a Counseller be informed of any matter of slander apt to be given in evidence, and hee speakes it at other places, and at another time, then in evidence an Action lies for it, for the same reason.

In confirmation of the former case, there was this case put and agreed for Law, which was the case of Parson *Pris* in *Suffolke*, the case was thus. In the Acts and Monuments of Mr. *Fox*, there is a relation of one *Greenwood* of *Suffolke* who is there reported to have perjured himselfe before the Bishop of *Norwich* in the testifying against a Martyr in the time of Queene *Mary*, and that afterwards by the judgement of God, as an exemplary punishment for

for his great offence, his bowels rotted out of his belly.

And the said Parson *Prit* being newly come to his benefice in *Suffolke*, and not well knowing his Parishoners, preaching against perjury, cited this story for an example of the justice of God and it chanced that the same *Greenwood* of whom the story was written, was in life, and in the Church at that time, and after for this slander, brought an Action, to which the Defendant pleaded not guilty, &c. and upon evidence all the matter appeared, and by the rule of *Anderson* Justice of Assise he was acquitted, because it did appeare, the Defendant spoak the words without malice, and this rule was approved by the Kings Bench in this case.

In the arguing of *Sanderson* and *Rudds* case which I remembred before, these cases following were cited by *Gothelt* Serjeant, who was of Counsell with the Defendant, and agreed by the Court for Law.

Iames and *Rudlies* case, the Defendant spoake by way of advise to his friend, telling him that the Plaintiffe was 40. & 41 of the Queene in Common Pleas.

was full of the French Pox, and therefore adviſed him not to keepe him company, adjudged (he ſaid) that no Action would lie for theſe words of adviſe, the reaſon is, becauſe that theſe words were not ſpoken out of any malice to the Plaintiffe, but meerely out of good will to his friend.

Trin. 7. Car. in the Kings Bench. *Norman* and *Simons* caſe remembred before, the Plaintiffe brought an Action for words, and declared that they were ſpoaken *falſo & malitioſe*; the Jury find the words, and that they were ſpoken *falſo & injurioſe*, judgement was given that the Action would not lie, becauſe that they did not find the malice; for if the words were not ſpoaken malitiouſly, no Action will lie.

And therefore I concieve that if a man bring an Action for words, and do not declare that the words were ſpoken *malitioſe* as well as *falſo* that the Action will not lie.

Hil. 4 Jac in the Kings Bench. In the caſe of the Lady *Morriſon* that I have cited before this caſe was put by *Popham chiefe Juſtice*: If one ſay in Counſell and good will to his friend, that

that it is reported that he hath done such or such an ill Act, and adviſes him to purge himſelfe, and avoid ſuch occaſion afterwards, it ſe mes (ſaith he) that an Action will lie for ſuch counſell, but quære ſaith the Reporter, for it is without malice. And truly for my part I conceive an Action will not lie for that reaſon, but I ſubmit it to the judgement of the Reader.

And now I have finiſhed my labour of ſhewing you what words are Actionable in the Law, and what not. It will, in the next place be very neceſſary to be knowne, where a mans Suit or proſecution at Law, ſhall ſubject a man to an Action, and where not, and here I ſhall lay downe this as a rule.

That for any Suit or other legall proſecution in courſe of Juſtice [if not out of malice and touching a mans life] no action will Lie. 13. H. 7. Keilway fo. 26. 11. of the Queene Dyer. fo. 2.

A Man broug't a Writ of Forger of falſe deeds againſt a Lord, pending which Writ, the Lord for the ſlander of the ſaid Forgery by the ſaid Suit brought his Action *de ſcandalis Magnatum*: the Defendant juſtifies the ſaid ſlander by bringing of the ſaid Writ, by

the better opinion there[which is also agreed for Law in *Bucklies* case in my L. *Cokes* 4. Booke the justification was good, for [saith the Booke] no punishment was ever appointed for a Suit in Law, though that it were false and for vexation.

Coke lib. 8. fo. 124. *Cutler* and *Dixons* case, adjudged that if one exhibit Articles to a Justice of Peace against a certaine person, containing divers great abuses and misdemeanours, not only touching the *Petitioners* themselves, but many others, and all this to the intent that he should be bound to his good behaviour, in this case the party abused shal not have for any matter contained in such Articles, an Action upon the Case, because that they have pursued the ordinary course of Justice in such case, and if actions should be permitted in such cases, those which have good cause of complaint, will not dare to complaine, for feare of infinit vexation.

Owen Wood exhibited a Bill in the Starchamber against Sir *Richard Buckley*, and charged him with divers matters examinable in the same Court and further that he was a maintainer of Pirates

rates and Murderers, and a procurer of Murders and Pyracies (which offences were not determinable in the said Court) upon which Sir *Richard Buckley* brought an Action.

In this case it was adjudged, that so the said words not examinable in the said Court, an action would lie, because this could not be in course of Justice for that the Court hath not power or jurisdiction to do that which belonges to justice, nor to punish the said offences, *&c.*

Also by the Law no Murder or Pyracy can be punished upon any Bill exhibited in English, but the offender ought to be indicted of it, and upon this to have his tryall; so that he that preferred this Bill hath not onely mistaken the proper Court, but the manner and nature of prosecution, so that it hath not any appearance of an ordinary Suit in course of justice.

But if a man bring an Appeale of murder returnable in the Common bench, for this no action lies; for though the Writ is not returnable before competent Judges, which may doe justice, yet it is in nature of a lawfull Suit namely by writ of appeale. *Starlet*

Hob.Rep: pa:268 pl.238

Searlet brought an Action against *Stiles* for these words; *thou didst steale a Sack.* The Defendant pleaded that there was a Sack of a mans unknowne stolen and that the common fame was that the Plaintiffe had stolen it, whereupon the Defendant did informe *Thomas Kempe* a Iustice of Peace, that hee had stolen it, and in complaining and informing the said Iustice thereof hee did there in the presence of *Kempe*, and of the Plaintiffe say unto the Plaintiffe & of him *thou diddest steale, &c.* whereupon the Plaintiffe demurred in Law.

There is nothing spoken to the case in the Booke; but I conceive the Law will be somewhat strong for the Plaintiffe, that the demurrer is good, and that the Action notwithstanding the Defendants justification will well lie.

For though common fame [as it is agreed in *Chudington* and *Wilkins* case be a sufficient warrant to arrest for felony, though the same be not true, as also to charge a man with felony [as it is agreed in *Bland* and *Masons* case] because these tend to the advancement of Iustice; yet it doth not warrant any man, to say he is a Felon, or a Theefe;

Hob. Rep: pa 112, pl 105

Hob Rep pa 425 pl 381

for

but though common fame be such, yet the party suspected may be innocent.

Nor doth it any way difference the case, that the words were spoken before a Iustice of Peace, because, though common fame may (as I have said) warrant him to charge him with felony before a Iustice of Peace, yet it cannot warrant him to call him felon.

A man brought an Action against another for calling of him Theefe; The defendant pleaded that there was a Robbery done, *&c. & communis vox & fama patriæ* was that the Plaintiffe was guilty of it, and so justifies; but the justification was held nought, for common fame that a man is a Theefe, will not justifie any man in the calling of him so. But there it is agreed, that it would defend a man in arresting and imprisoning another for it. Hob Rep page 93 pl 71 cr pa 112 pl 105

Cuddington and *Wilkins* case adjudged that to call a man a Theefe after a generall, or speciall Pardon, though the Defendant knew it not, will beare an an Action, but there it is agreed, that to arrest a man for Felony after pardon if he knew it not may bee justifiable; because it is a legall course and an Act of justice.

In

Trin: 16. Car: in the Kings Beach.

In *Justice Crooks* case it was agreed by the Court, that though it be lawful for a man to preferre a Bill in the Star-chamber against a Judge for corruption, or any other, for any grand misdemeanour, because it is a proceeding in an ordinary course of justice. Yet if the plaintiffe will publish the effect of his Bill in a Taverne or other place openly, by this meanes to scandall the defendant, this is punishable in another Court, notwithstanding the Bill pending in the Star-Chamber, because this tends meerely to scandall, and not to a pursuing of the ordinary course of justice, and so *Jones* Justice said it had bin adjudged.

Owen Wood, and *Buckleys* case cited before doth in effect make good that which Justice *Jones* said; the case was thus, *Owen Wood* exhibited a Bill in the Star-Chamber against Sir *Richard Buckley*, and charged him with very great misdemeanours: afterwards *Buckley* brought an action against *Owen Wood*, for publishing that the said Bill and matters in that contained were true, and had judgment, which was afterwards reversed in the Chequer Chamber,

Chamber, becauſe that the plaintiffe layed that the defendant publiſhed the Bill to be true, without expreſſing the matters in particular conteyned in the Bill, upon which the action was intended to bee founded, ſo that thoſe which heard only the ſaid words, that his Bill was true, cannot without further ſaying, know the clauſes which were ſlanderous to the plaintiffe. So that it is in this caſe plainely admitted, that if hee had publiſhed the particular matters contained in the Bill, and this had beene ſhewen by the plaintiffe, ſthere the action would have layen.

Note Reader, I have inſerted this clauſe, in the rule before layd downe [where the proſecution in courſe of *juſtice*, is not out of malice, and touching a mans life] for this reaſon.

Becauſe I doe conceave, *That in caſe where a man is ſcandaled in his reputation, and his life in queſtion, by a malitious proſecution in courſe of juſtice, that in ſuch caſe an Action will lye.*

If two falſly and malitiouſly conſpire to indict another, and after hee that is ſo indicted, is acquitted, a Writ of conſpiracy lyes. So if one only falſly and malitiouſly

F.N.B 114. *D.* Cook *lib.*9 fol.56. The Poulterers caſe.

malitiously cau'e another to bee indicted, who is thereupon acquitted, an action upon the caſe in nature of a conſpiracy, lyes againſt him for it; and ſo it hath bin often adjudged; I ſhall only remember one caſe in point.

Paſch. 3. *Jac*: in the Kings Bench *Rot.* 372.

Marſham brought an action againſt *Peſcod*, and declares how that he was of good fame and report, and that the defendant intending to defame him, *falſo & malitioſè* procured the plaintiffe to be indicted of Felony, & to be arreſted and impriſoned, *quouſq; fuit acquietatus*; ſo that the alleaging of the acquittall was inſufficient, for that hee ought to have ſaid that he was *legitimo modo acquietatus*, the defendant pleaded not guilty and it was found for the plaintiffe, and *Richardſon* ſaid in arreſt of judgment that this action will not lie, if it bee not alledged that hee was lawfully acquitted and ſaid that *F. N. B.* had the like Writ, and there it is alledged expreſly that hee was lawfully acquitted, and ſo it ought here.

Tanfield Juſtice, A conſpiracy, nor an action in nature of a conſpiracy will not lie, if the plaintiffe bee not *legitimo modo acquietatus*; but if one procure another

another to be indicted arrested and imprisoned, *falso & malitiose*, hee shall have an action upon the case for the slander and vexation, though that hee be never acquitted; and he said that the like action upon the case had beene adjudged to lie well, though that the Plaintiffe were never acquitted; and the Justices relied much upon the words *falso & malitiose*; and after judgement was given for the Plaintiffe.

Thus you may see that where a man is falsly and malitiously procured to be indicted, if he be acquitted a Writ of conspiracy, or an action upon the case in nature of a conspiracy, as the case shall be, will lie, and though he be not acquitted, yet an action upon the case will lie for the slander and vexation. Yet in all these cases there is a prosecution in course of justice; but because this prosecution was malitious, tending much to the slander and scandall of the plantiffe, therefore the action lies.

But here I would have you observe, *Reader*, that the plaintiffe ought in these actions to declare, that the defendant, *falso & malitiose* procured him hee

to bee indicted, becauſe the malice is the ground of the Action; and if upon the Tryall it doe appeare that there was *Probabilis cauſa* for the indictment and proſecution thereupon, the Action will not lie. Thus much ſhall ſuffice to ſhewe you, in what caſe a legall proſecution in courſe of Iuſtice ſhall Subject a man to an Action, in what not. In the next place I ſhall ſhew you, which I cannot omit.

For what ſcandall of a Noble man, or great Officer, &c. an action de ſcandalis Magnatum *will lie upon the Statutes of* 3. E. 1. *cap.* 33. *or* 2. R. 2. *cap.* 5.

Coke lib. 4. fo. 12. b. 13. a.

For a Suit or other legall proſecution in courſe of juſtice againſt a Noble man, or great Officer, no Action lies, as is adjudged in the caſe of *Forger* of falſe deeds cited before, ſo that as to this, there is no difference betwixt a Noble man and another perſon, but what ſcandalous words may be Actionable in caſe of a Nobleman, for which an action *de ſcandalis Magnatum* will lie, and what not, may bee very conſiderable. I ſhall cite only one caſe to this purpoſe, which will be as a light to all caſes of this nature, and therefore

give

give me leave to give it you wholly [without dissection or abbreviation] as I find reported.

The Earle of *Lincolne* brought an Action *de scandalis Magnatum* upon the Statute of *Westm.* 1. cap. 33. against one *John Righton*, and recited the Statute, and said that the Defendant said of him, my Lord is a base Earle, and a paltry Lord, and keepes none but Rogues and rascals like himselfe. Vpon not guilty pleaded it was found for the Plaintiffe, and it was moved in arrest of judgement that the words were not actionable, for though they were unseemely & immodest yet they were not such defamatory words upon which to ground an Action, for though they were true, the Earle could not incurre any prejudice by them. *Crook cont.* this action *de scandalis magnatum*, is not to be compared to other actions upon the case, for words spoken of any other persons for this is inhibited by Act of Parliament; and if the words bee such that any discord may arise by them betwixt the King and his Subjects, or his Nobles, or any slander to them to bring them into contempt, this action lies,

Trin. 5. Iac. in the Kings Bench.

and I have ſeene a Record of a caſe in 4. *H.* 8. of ſuch an action brought by the Duke of *Buckingham*, for ſuch words which might cauſe him to be in contempt, which were holden ſufficient upon which to ground an action, *Hobart Attorney Generall* for the Plaintiffe alſo; who ſaid that though an Action doth not lie for words betwixt common perſons, but in caſe where they are touched in life or Member, or much in reputation; yet if one ſpeake any ſcandalous words of an Earle or other Peere of the Realme, which impeaches their credit, becauſe that they are of the great Counſell of the King and State, and a principall part of the body politique, ſo that their diſcredit or diſparagement, is a diſparagement to all the Realme, therefore every thing which trenches only to their diſcredit is a cauſe of action, and this was the cauſe of the judgement in the caſe of the Ducke of *Buckingham* in. 4 *H.* 8. *Fenner Iuſt.* it ſeemes to me that the action lies, for they are words of great ſlander to the Earle. But where the Statute of *Marleb.* is that Lords ſhall nor diſtraine the Beaſts of the ſub-

jects

ject of the King, and carry them into Castles so that they cannot be replevied; and if one say that a *Lord* hath so done, yet an Action will not lie, *Tanfield Justice concessit*, but he saith if one say of a *Lord* that he used to distraine and put the Beasts in his Castle, *ut supra*, an action lies; for one act against Law wil not bring him into contempt: but if it be usuall for him so to do, this is a cause to make him contemptible. In the case of the Earle of *Arundell*, who had made Commissions to his Servants to make *Leases*, and improve Rents, one said of him, *My Lord hath sent his Commissioners to spoyle the Country*, it was adjudged that this action would lie, and yet in case of a common person it would not lie without doubt, yet because that it may cause the Lord to be in contempt with the King and the People, this action lay, and so it seemes to me that it will here, *Williams Justice* to the same purpose; and that the Earle is *conservator Pacis* at common *Law* and *Comes Regis*, and if any one speake of them any thing which may make them to bee contemned of the King or his people, an action lies

upon this STATVTE.

Yelverton Iustice was absent, judgement was respited to the intent that the Defendant by his submission might give satisfaction to the Earle.

Here you see the difference between words actionable in case of a Noble man, and of a common person. For words only of discredit to a Nobleman, and which may bring him to contempt with the King or his people are sufficient to maintaine an action *de scandalis magnatum*, otherwise in case of a common person.

I have now *Reader*, quite finished my labour of shewing you for what scandals an action will lie, for what not. But before I conclude, there are two things yet in all Actions for words worthy the knowing, which I cannot omit. The first is to declare unto you the use or office of an (*innuendo*) And the next is, to shew you where an *Averrement* will be necessary, and where not.

For the first, you may take this for a certaine and infallible rule.

That an (innuendo) *shall never make words actionable, which of themselves are not Actionable.*

And

And therefore, if words be of a double or indifferent meaning, and in the one ſence actionable, in the other not; in ſuch, caſe an (innuendo) *ſhall never make them actionable.*

As if a man bring an Action againſt another for ſaying that he hath the Pox [*innuendo* the French Pox] or for ſaying that the Plaintiffe burnt his Barne [*innuendo* a Barne with Corne.]

Coke lib. 4to. 17. b. & 20. a.

In theſe caſes the [*innuendo*] where the words are of an indifferent meaning, and may be taken ſo as not to be Actionable, ſhall not ſtraine them to ſuch an intendement, as to make them Actionable; and therefore the [*innuendo*] in theſe caſes is idle and to no purpoſe.

So if the words be incertaine of themſelves, or the perſon of whom they are ſpoken, an [innuendo] *ſhall never make them actionable.*

If a man bring an action againſt another for ſaying that the Plaintiffe tooke away money from him with a ſtrong hand [*innuendo felonice*] here the words being incertaine in the intendment, whether of a Treſpas, or Felony the (*innuendo*) cannot extend them to

Mich. 15. Car. in the Kings Bench. cited before.

an intendment of felony, thereby to make them actionable, and so it was adjudged.

So if a man bring an action against another, for saying that hee forged a warrant [*innuendo quoddam Warrantum, &c.*] as *Thomas* and *Axworths* case is cited before, or for saying that he forged a writing [*innuendo* such a writing] as *Harvy and Duckins* case is likewise cited before. In these cases, because the words themselves are utterly incertain, adjudged that the [*innuendo*] shall never make them actionable.

Hob. Rep: pa: 3 pl. 4

Hob. Rep: pa: 63, pl 48.

Coke lib. 4. fo. 17 b.

A Servant of *B.* brings an action against one for these words; One of the servants of *B.* (*innuendo* the Plaintiffe. is a notorious Felon, or Traytor, &c) And if an Action be brought for these words, I know one neere about *B.* that is a notorious Theefe, (*innuendo* the Plaintiffe:) In these cases, because of the incertainty of the persons intended by the words the [*innuendo*] shall not make them actionable.

I could multiply cases upon this ground, but because these will bee sufficient, I will adde onely the Office of an (*innuendo*.)

The

The office of an [innuendo] *is onely to containe and designe the same person, which was named in certaine before*: as thus, two are speaking together of *B.* and one of them saith, hee is a Thiefe; there *B.* in his Count may shew that there was a speech of him betwixt those two, and that one of them said of him, hee (*innuendo* the plaintiffe) is a thiefe. *Cook. lib. 4 fol. 17. b*

Or else to declare the matter or sence of the words themselves, which was certainly expressed before; as thus, *A.* and *B.* speaking of *C.* *A.* said that *C.* was a Traytor, to whom *B.* said that he was so too; in this case if *A.* bring an action for these words, he may shew in his Count, that there was a speech betwixt him and the defendant of *C.* and that the plaintiffe said to the defendant that *C.* was a Traytor, and that the defendant said then to the plaintiffe, that hee (*innuendo* the plaintiffe) was so too [*innuendo* a Traytor.]

In both these cases the (*innuendo*) is good, because it doth its Office, in designing of the person, as also in declaring of the matter or sence of the words which was certaine before.

But an [*innuendo*] cannot make a person *Cooke lib. fol. 17. b*

ſon certaine, which was incertaine before, nor alter the matter or ſence of the words themſelves; for it would be inconvenient, that actions ſhould bee maintained by imagination of an intent, which doth not appeare by the words, upon which the action is founded; but is utterly incertaine, and ſubject to deceaveable conjecture.

For by this meanes, if I ſhould bee ſuffered to be the declarer of the meaning or intendment of the incertain and doubtfull ſpeeches of another man; I might judge him to ſpeake that, hee never thought or intended, and ſo puniſh him for that wherein he never offended.

The next and laſt thing to be conſidered is where an averrement will be neceſſary in theſe actions, and where not: and here I ſhall lay downe this as a ground.

That in all caſes for words where there is any thing that is the cauſe or ground of the action, or tends neceſſarily to the maintenance of it, in ſuch caſe the action will not lie, without that thing be expreſſly averred to be, or not to be, as the caſe requireth.

Hob Rep pag. 8. *Miles* brought an action againſt *Jacob*

for these words; Thou (*innuendo* &c.) hast poysoned *Smith* (*quendam, Sam. Smith ad tunc defunct. innuendo*) adjudged the action would not lie for this reason [amongst others] because that did it not appeare that *Smith* was dead at the time of the words spoken; and the (*innuendo*) for that purpose is no sufficient averrement.

The like case was *Trin.* 17. of this King; *A.* brought an action against *B.* for these words, *Thou hast killed my brother* (*innuendo C.* &c. *fratrem*, &c. *nuper mortuum*) adjudged the action would not lie, because the plaintiffe did not averre that he was dead at the time when the words were spoken, and it was ruled that the *innuendo* was not a sufficient averrement. *Trin.* 17. Car. in the Common-Pleas.

The reason of these cases, is, because the death of the party is the ground of the action, and if hee were not dead (which shall the rather bee intended, without the plaintiffe do expresly aver him to bee dead) then the plaintiffe could not bee indamaged by the speaking of the words, and by consequence no action will lye for them.

I must confesse that I have a report of

a case which was 5. of *King Iames* adjudged against the former cases, and the case was thus: Sir *Tho. Holt* brought an action against *Taylor* for these words, Sir *Thomas Holt* hath killed his Cooke, *&c.* and did not averre that he had a Cooke, nor that the Cook was dead, and this was moved in arrest of judgment; and by the whole Court the Declaration was held good, because it shall not bee intended, that there is any such purgation of the slander as this is, except it doth appeare in the Record; as the life of a man, which is reported to be dead. But if it were expressed in the Record, that the party reported to be dead, was in life, it were otherwise.

Pasch. 1. Jac. in the Kings Bench Rot. 107.

As if words were spoken of a woman, that she had murthered her husband, and she and her husband bring the action, in this case the action will not lye, because that it doth appeare by the Record, that the slander is not prejuditiall, but is purged notoriously, by the apparent being of the husband in life, like *Snagg* case in my *Lord Cookes* 4. Booke *Quære tamen*, for I dou bt Reader the Law of this case, because of the cases before adjudged.

Cooke lib. 4 fol. 16. a

A

A. saith that *B.* told him that *C.* stole a Horse, these words with an averrement that B. did not say any such thing to A. will beare an action, like the Lady *Morrisons* case which I have formerly cited, fo. 6.b.

Whether Welsh words, or words in English doubtfull in sense, yet equipollent, and of a common intendment and acceptation in some certaine place with words Actionable, will beare an Action, without an expresse averrement of the importance of them, or no? *quare & vide* fo. 6. a.

Hasselwood and *Garrets* case cited before, whosoever is hee that is falsest Theese and strongest in the County of *Salop*, whatsoever he hath stollen, or whatsoever he hath done, *Thomas Hasselwood* is falser then he resolved that the words were actionable, with an averrement that there were felons within the County of *Salop*; but for default of such averrement the judgement given in the Common Pleas was reversed in this Court. Pasch. 1. Iac. in the Kings Bench. Rot. 107.

Note *Reader*, if there were no felons in that County (which will rather bee intended, if it be not averred that there were some) then the speaking of the words

words could be no slander to the Plaintiffe, and so no Action can lie.

Hob Rep page 309

Blands case cited before, hee brought an action against *A. B.* for saying that he was indicted for Felony at a *Sessions* holden, &c. and did not averre that he was not indicted, and after a Verdict for the Plaintiffe, judgement was stayed, because there was no Averrement, *ut supra*. Note if hee were indicted, which he doth tacitly admit, then no cause of action.

Mich. 15. *car*: in the Kings Bench.

Johnson against *Dyer*, the Defendant having communication with the Father of the Plaintiffe, said to him, I will take my Oath that your Son stole my Henns; and the Plaintiffe did not averre that he was his Sonne, or that hee had but one Sonne, and therefore adjuged that the action would not lie. In this case if he were not his Sonne, then no cause of action.

Pasch. 7. Iac. in the Kings Bench.

One *Clarke* said that he had a Sonne in *Nottinghamshire* who had his Chest picked, and a hundred pounds taken out of it, in one *Lock-Smiths* house; and I thank God I have found the Theefe who it is; it is one that dwelleth in the next house called *Robert Kinston*:

upon

upon which *Kinston* brought an Action and had a verdict, and it was moved in arrest of Iudgement, because that he did not averre that hee dwelt in the next house; *Crooke* one said that *Prichards* man robbed him, who brought an Action, and did not averre that he was *Prichards* man, and therefore it was held that the Action would not lie. And the Iustices in this case would not give judgment.

Non constat in this case that the Plaintiffe was the party of whom the words were spoken; for there might be another of the same name dwelling elsewhere: and therefore hee ought to averre that he dwelt in the next house, that he may be certainly intended to be the same person of whom the words were spoken.

Where words shall not be Actionable without an averrement of a speciall dammage See fo. 28.

I have cleerely proved the ground before laid downe, and by these cases you may bee sufficiently instructed, where an averrement will be necessary and where not. And so I have quite finished this small Treatise.

May

May the Reader find as much profit and delight in the reading of it, as the Author had in compoſing of it, ſuch is the ardent deſire of

Your affectionate friend

JOHN MARCH.

Arbitrement.

THe next thing *Reader*, that I have undertaken to discourse of, is, Arbitrements, the learning whereof will be very usefull to all men; in regard that Compremises or Arbitrements were never more in use then now. And most men either have been or may be Arbitrators, or at least have done, or may submit themselves to the Arbitration of others. And as long as differences and contentions arise among men, which will bee to the worlds end, certainly the learning of Arbitrements will well deserve our knowledge. Which being well observed and learnt by all men, will be a good meanes to prevent many Suits and contentions in the Law for the future which are now daily occasioned through the defects of Arbitrements which rather beget and raise new controversies amongst the parties

parties, then determine the ould. The only cause whereof is the ignorance of men in this learning. The Composer hereof, *Reader*, tooke this paines, only out of a desire of the Common good, that none might bee ignorant of that which concernes all. And if it shall effect that for which it was made, the instructing of the ignorant, and the good of the publike, the Author hath his ends, and abundant recompence for his labour. Which that it may accomplish is the earnest and affectionate desire of the true Servant to the publike.

IO MARCH.

Ib

In my Lord *Dyer* it is said that to every Award, there are five things incident. Trin. 4. of the Queen Dyer. fo. 217. pl. 60.

1. *Matter of Controversie.*
2. *Submission.*
3. *Parties to the submission.*
4. *Arbitrators.*
5. *Rendring up of an Arbitrement.*

Reader, my purpose is (God willing) to prosecute every one of these parts or incidents of an Award [though paradventure not in the order before set downe] conceiving them to be as exact a discription or delineation of those things that are requisit to every award, as possibly can be made: And indeed reaching to all the cases in the Law, which do principally or chiefely concerne Awards or Arbitrements.

First then there must be a matter of debate, question and controversie.

Secondly, this matter of debate question and controversie must bee submitted.

Thirdly, there must be Parties to the submission.

Fourthly, there must be Arbitrators, to whom the matter in controversie must be submitted. And lastly the Arbitrators must make an award or an Arbitrement.

Vpon these severall branches, I shall raise severall questions, and debate and cleare them as I goe, and first.

Who may submit to an Arbitrement and who not?

I Take this to be regularly true, that no person, which is not of ability in judgement of Law to make a grant, can submit himselfe to an Arbitrement.

As men Attainted of Treason, Felony, or a Præmunire, Ideots, madmen, a man deafe dumbe, and blind from his Nativity, a Feme Covert an Infant, a man by Duresse for a submission to an Arbitrement must be *Spontanea voluntate.* Persons Outlawed; for they have no Goods: a Dean without the Chapter, a Major without the Commonalty; the Master of a Colledge or Hospitall without his Fellowes, or the like. All these as they are incapable to grant

grant, ſo I conceive, that they are not of capability to ſubmit to an Arbitrement, but that the ſubmiſſion will bee abſolutely void in theſe caſes.

The reaſon of theſe caſes may be, becauſe that they have not power of themſelves to diſpoſe of their intereſt or property, and therefore they cannot tranſferre ſuch power over to another; for the rule is, *quod per me non Poſſum, neque per alium.*

And *Hill* 15. of this King in the Kings Bench, betwixt *Rudſton* and *Yates*, it was adjudged, that the ſubmiſſion of an Infant to an Arbitrement was abſolutely voyd. *Hill.15. Car. in the Kings Bench, Rot.313. ſee 14.H. 472.10.H 6.14.*

But now on the other ſide, I conceive that all perſons whatſoever that are not fettered with theſe naturall or legall diſabilities; but are of capacity to make a grant, that ſuch perſons may ſubmit themſelves to an Arbitrement, as perſons not attainted, *compos mentis*, deafe dumbe, or blinde, Femes ſole, men of full age, and the like, the ſubmiſſion of ſuch perſons to an Arbitrement is good; but enough of this; in the next place I ſhall conſider.

What things may be submitted to an Arbitrement, and what not?

THat is to say, what things are in Law arbitrable, and what not? Things and Actions which are meerely personall, and incertaine, as Tresp. 22.H.6.39 passe, a Ward taken away, and the like, 4.H 6.17. 14.H.4.2 are arbitrable.

4.H.6.17. 2 H.5.2. But things which are of themselves certaine, are not arbitrable, except the submission be by Deed, or that they be joyned with others incertaine, as Debt with Trespasse, or the like.

The reason that is given in 4 H.6. is, because the nature of an Arbitrement is, to reduce things to a certainety, which are in themselves incertaine, and not to make things more certaine, which are certaine already.

And the reason likewise that is there given, why a thing certaine, which is joyned with a thing incertaine should be arbitrable, is because that the arbitrement is intire, and therefore cannot be good as to that which is arbitrable, and voyd for the residue; (which you must

must understand being of things within the submission) but being good for the part which is incertaine, it will make the rest also arbitrable.

Chattels reals or mixt, are not of themselves alone arbitrable, as Charters of Lands, Leases, or the like, without the submission be by speciality.

Debt upon the arrerages of account before Auditors, because such Debt is due by Record; Annuities, nor Freeholdes, none of these are of themselves arbitrable, without the submission bee by speciality.

I must confesse that some of these Bookes say that Arbitrators may award a Freehold without Deed. Others say that the submission must be by speciality (as you may observe before) and some say that the *Arbitrement* in these cases must be by Deed and that then the arbitrement may be pleaded in Barre of an action.

g.H.6.60.
14.H.4.24
19.H.6.
37.
4 H.6.17.
3 H 4, 5,
6, H.4.9.
9.H.6.60.
14 H.4.18
3.H 4.6.
11.H.4.12
14.H.4.
19.& 24.
34.E.3.16
12 Ass.pl.
16.21.E 3
15.23.H.
7.Keilway
99.pl.6.
21.E.3.26.

But *I take this as a generall rule, that no Chattels reals, or mixt, no Debts by Deed, or Record no Annuities nor Freeholds are of themselves arbitrable though that the submission bee by Deed, and I shall prove it thus.*

If they were arbitrable of themselves, then upon an action brought in any of these cases, an arbitrement were a good plea in Barre of the action but an Arbitrement in such case is no plea in Barre of the action as appears by the books before cited therefore I conceive that the argument is plaine & evident that these are not of themselves arbitrable.

But for further proofe of this ground that I have laid downe; it is taken as a generall rule in *Blake* case in my *L. Coke* 6. Book, that an arbitrement is no plea when an action is founded upon a deed, when it is in the Realty, or mixt with the realty, but in such cases only, or at least, regularly, where Damages alone are to be recovered.

Coke lib. 6. fo. 43. b. 44. a.

I shall conclude this with the Booke of 21. E. 3 cited before, that an arbitrement that the one party shall have the land out of the possession of the other, doth not give a Frechold; and if hee refuse to permit him to have the Land, he hath no remedy if hee hath not an Obligation to stand to the Arbitrement.

21. E. 3. 26

By this case wee may learne, as also by that which I have told you before, that

that though these thing are not of themselves arbitrable; & so the arbitrement not pleadable in Barre of an action. Yet a man may in such cases bind himselfe by Obligation to stand to an award [as it is usuall so to do] and for the non-performance of the award, the Bond will be forfeited. *And* this is the submission by specialty so often spoaken of in the Bookes before.

And therefore I conceive that the opinion of *Greuill* and *Pollard* in 23. H. 7. is no *Law*, who say that where there is a submission of the right, Title, and possession of land, [without any other personall difference] to an award, that an arbitrement *in* such case is void; and that an Obligation to obey such an arbitrement is void. 23. H. 7. Keilway fo 99. pl. 6.

It is true, the Booke makes a quære of it. because that others were (as the Booke saith) cleere of another opinion. And certainely the Bond is good. as common experience teaches; I shall put a case like it, which *I* conceive will plainely prove it.

A man makes a Feoffement upon condition that the Feoffee shall not take the profits, the condition is absolutely b. Coke upon Littleton fo. 206

lutely repugnant and void. But a Bond in such case conditioned that the Feoffee shall not take the profits, is good.

So I say in this case, though the thing it selfe be not arbitrable; yet if a man in such case will bind himselfe to stand to an award, the Bond is good.

Lastly, causes matrimoniall are not arbitrable neither are Offences criminall as Treasons, Felonies, &c. because it concerns the Commonwealth that such offenders be punished. But of this sufficient; the nature or kinder of submissions is now to bee considered.

Submission to an Award may be either { *Generall*, or *Speciall*. *Absolute*. or *Conditionall*.

Coke lib. 8.fo.97.98 Balpoles case.

A Generall Submission.

A generall Submission is of all matters, Suits, Debts, Duties, Actions, and demands whatsoever.

Coke ubi supra Trin. 4. of Queen yer so b.

A speciall Submission.

A speciall Submission is only of some

some certaine matters in controversy, as such land then in question; or all actions of *Debt*, *Trespasse*, or the like, here I could observe unto you the difference betwixt a generall submission conditionall, and a speciall submission conditionll; but because it will be more apt and agreeable in case where I shall shew you what will be a good arbitrement and what not, I shall referre it thether without further saying.

An absolute submission.

An absolute submission, is, where the circumstance of time, when; the manner of the arbitrement, howe; whether Sealed or unsealed or the matter of the arbitrament; viz: to arbitrate part or all or the like, are wholy left to the Arbitrators. Coke. & Dyer ubi supra.

A conditionall submission.

A conditionall submission, is, where the submission is with an *ita quod* or *Proviso &c.* the award be made and delivered under th hands and seals of the arbitrators, before such a time; Coke & Dyer. ubi supra.

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in such case, if the time manner and matter, are not all exactly observed, the arbitrement will be void; but of this more fully hereafter.

Dyel fo. 215.b.pl. 59.& 242. pl.52.

Note Reader, that a submission may be by word onely as well as by Deed or specealty but the submission by deed is better, for then though the submission be of things not arbitrable, the party forfeites his Bond if he doe not observe it whereas if the submission were by word onely there were no remedy in such case to inforce the party to performe the award

Who may be arbitrators and who not?

I conceive it most fit, that such onely should be Arbitrators who, as they are indifferently chosen (as it is said in the Condition of the Obligation) are men indifferent, just and upright, swayed neither with favoure feare or affection to either party men likewise having sufficient parts, and competent understanding and knowledg in the matter or busines referred to Arbitrement having neither legall

as

(as persons Attainted, convicted of perjury &c.) nor naturall impediments, as Infants, Ideots, madmen, or the like.

These qualifications in arbitrators being duly observed a man need not dout of a iust and upright sentence the want of the observation of which, causes many vnjust and undue sentences in Arbitrations.

But I doe not find in our Law that either legall or naturall disabilities, doe hinder any man from being an Arbitrator; or avoide his sentence and certainely they doe not for this differs much from a submission to an Arbitration, for in such case a man ties his interest and binds his person which every one is not of capacity to doe; but in this case what he doth as an arbitrator, is onely to charge or discharge others. And besides they are chosen by the parties themselves, and if they they be not competent Jvdges, the fault is theirs that chose them.

And now I shall proceed to shew you what Arbitrators are and their power by which you will easily perceiue, of what

what high concernement it is to men, to have a speciall care of the choise of Arbitrators.

What arbitrators are and there power.

An Arbitrator is as our bookes say, a Judge indifferently chosen by the parties, to end the matter in controversy betweene them, *ad Arbitrium* and therefore they are said to be Arbitrators because they have an Arbitrary power, and may judge according to there will and pleasure, so that their judgment be according to the submission & these Judges are not tied to any formalities, or punctualities in Law neither are they so borne, as other Judges established by publike authority are.

Pasch. 91. of the Queene Dyer fo. 356. pl. 39 19. H. 6. 36. 37. Coke lib. 5. fo. 78. a. 8. E. 4. 1. & 2.

Besides, their power is farre greater, for as they may judge as they please, keeping themselves to the submission, so their sentence is absolutely definitive and conclusive from which there lies no Appeale; as it was excellently well said by *Heath Iustice*, in arguing of the case of *Rudston* and

Yates

Yates cited before the judgement of Arbitrators said he (provided that they keepe themselves to their jurisdiction) is higher then any judgement given in any Court. for if they erre, no Writt of Error lies to reverse their judgement, no, not so much as Equity against them. Mich. 17. Car. in Kings Bench.

This is true where they keep themselves close to the submission; but if they do not, in such case (though no Writt of Error lies to reverse their judgement) upon an Action brought upon a Bond or premise for not performing an award, if the Defendant plead that the Arbitrators made no award, and the Plaintiffe replies that they did make an award, and sets it forth in speciall, if it do appeare that the award is void (as it may be in many cases which I shall set forth hereafter) the Action in such case will not lie as every dayes experience teaches, and in which our Bookes are plentifull. By that which I have said before, it is manifest, how it concerns every man to have a care what Arbitrators hee makes choice of; but of this sufficient. The next thing considerable, is, *Whether*

Whether the power of Arbitrators be Assignable or not?

The Law is cleere that Arbitrators cannot assigne over their power, the reason is, because that it is but a nude power or Authority (which is evident in that it is revocable, as I shall shew you hereafter) and therefore by the Law not assignable. To which may be added, that it is a power coupled with a great trust and confidence, and therefore not assignable.

I confesse that the Booke in 47.E.3 doth tacitely admit this power to bee assignable where the case is thus, In Debt, the Defendant pleaded that they submmitted themselves to the Arbitrement of two persons, who did award that they should stand to the award of *W. P.* which *W. P.* made an award, which he hath performed, *&c.* here it is tacitely admitted that the Arbitrators might award that they should stand to the Arbitrement of another, but Brooke in abridging this case saith, the Law seemeth contrary.

47.E.3.20

In 8. *E.* 4. *pro totam Curiam* except *Yelverton*, where a man is bound to stand

ſtand to the award &c. who award that an Action ſhall be commenced betwixt the parties by the adviſe of *W.* and *P.* this is a good award for by this *W.* & *P.* are not Arbitrators, but onely executors of the Arbitrement. And in this caſe the Arbitrators judged the Title to bee tryed betwixt them; but know not whataction ſhould be brought. 8.E.4.1.& 10.

But if they had awarded, that the parties ſhould ſtand to the Arbitrement of W and P. this had beene void, becauſe that they cannot aſſigne ouer their power.

Yelverton held in the firſt caſe, that the award was void for the incertainty becauſe that W. and P. are to give their adviſe, which is not certaine vntill it be notified, and in this caſe he hath made them Judges.

I confeſſe that I doe ſomewhat doubt of the caſe, becauſe the judgment of the arbitrators ought to be finall, and this is no concluding of the matter in controverſy; but a transferring of their power over to the Lawe, to determine it.

Beſides, *W.* and *P.* may never give their

their advise, or may refuse to doe it, and in such case the arbitrement will prove idle.

And I do not conceive this case to 19.E.4.2. be like the case in 19. E. 4. where the Arbitrators awarded a certaine sume, and in surety of payment thereof, to be bound by the advise of Counsell, for here their judgement of the matter in controversie is certaine, and finall, and here is a some certaine award. ded for which an Action will lie, only the security is to be advised by Counsell; which is no assignement of their power, but of this more hereafter.

Emery, and *Emerys* case the chiefe point whereof was thus; the arbitrators award that the plaintiffe should make such a Release as one of the Arbitrators should like of; in this case the arbitrement was held to be void, because this was an appointing of an authority committed to them all, unto one which they cannot do. Mich. 41. & 42. of the Queen in the Common Pleas.

I shall conclude this point with *Samons* case in *Cookes* 5. Booke, where the case is thus: Arbitrators award that the defendant should enter into an Obligation to the plaintiffe, and doe not

not judge of what some the Bond shall be adjudged, the Arbitrement was void for the incertainety, and that the Arbitrators could not assigne over their power but that themselves ought to determine it; and therefore neither the plaintiffe nor the defendant could assesse the some the next thing considerable is.

Whether the authority of Arbitrators be countermandable or not?

In his case also the Law will bee strong and evident, that this authoritie is countermandable at any time before the award made; but not after, because then the authoritie is executed, and cannot be countermanded, and so are all our Bookes but 5.E4. where it is said that if a man be bound to stand to the Arbitrement of I N he cannot discharge the Arbitrator, contrary if he were not bound to stand to his arbitrement, yet Brooke upon this case saith, that it is cleere that he may discharge the arbitrator in both cases: but in the one case he shall forfeit his Bond in the other he shal loose nothing, because that *ex nuda submissio-*

28.H.6.6.
21.H.6.
30.49.E.3.
9.18.E.4.
9.8.E.4.
10.5.E.4.
3.Br. Arbitrement 35.6.H.7. 12.b.

one non oritur actio, so likewise it is resolved in *Vinyors case* which I shall put you presently.

In 28.H 6. by *Ashton Justice* if there
28.H.6.6. be two plaintiffs and one defendant or two defendants and one plaintiffe put themselves to the award of other neither the one plaintiffe with out the other, nor the one defendant without the other, may discharge the arbitrators, the reason is obvious, because the they were chosen by the joynt authority of both, and therefore cannot be countermanded by one alone.

Coke lib. 8.fo.82. But that which is the last and best authority, is *Vinyors case*; where it is resolved that though a man be bound to stand to the Arbitrement, &c. yet he may countermand the Arbitrators; the reason that is given is, because a man cannot by his own act make such an authority, powr, or warrant; not countermandable which by the law, & its own proper nature is countermandable, as I make a Letter of Attorney to make livery, or to sue an Action in my name or if I assigne Auditors to take an account, or if I make one my factor, or submit my selfe to an Arbitrement though

though that these are done by expresse words irrevocable, or that I grant, or am bound that al these shal stand irrevocable, yet they may be revoked; so if I make my testament or last will irrevocable, yet I may revoke it.

But in this case it was further resolved that by the countermand or revocation of the power of the Arbitrator, the Bond (according to the opinion of Brooke before cited) is forfited, because he was bound to stand to his award, which he doth not doe when he discharges the Arbitrator. I have sufficiently cleered it, that the authority of Arbitrators is countermandable; but hence arises two questions more, the first is.

Whether the Authority of Arbitrators be countermandable without Deed, or not?

The resolving of which doubt I conceive will stand upon this difference, where the submission is by deed. and where without deed; where it is by deed, in such case I conceive the authority cannot be counterman-

49.E.3.9. ded but by deed, and so is 49. E. 3. but where it is without deed, there the authority may be countermanded without deed and this I ground upon that rule of law *eodem modo quo quid creatur dissolvitur*. It is but agreeable to naturall equity, that every thing should be dissolved by the same meanes or power that it was created.

And in *Vinyors* case which I have cited before, there the submission was by deed, and the countermand pleaded by deed, the second, and last doubt or question considerable in this countermand of the authority of Arbitrators is.

Whether there ought to be notice of the countermand or no?

8.E.4.10. b.et 11.a. 21.H.6. 30.28.H. 6.6. et 6. H.7.10. Coke lib. 8.fo.81.b. §2.a.

There must be notice of the countermand, for without notice, it is no revocation or abrogation of the authority, and so it is resolved in the Bookes which you have in the Margent.

Vinyors case cited before was thus he brought an Action of debt upon

Bon

bond against *Wilde*, conditioned for
he standing to an award, to which
he defendant pleaded that the Ar-
itrator made no award, the plaintiffe
replied, that after the making of the
aid writing obligatory, and before
the Feast of &c, the defendant by his
deed &c. *revocavit & abrogavit eam-*
dem autheritatem &c. which he had
given by his writing obligatory to
the arbitrator, upon which the de-
fendant demurred.

Tis true, that in this case it was
resolved that the plaintiffe need not
averre that the arbitrator had notice
of the countermand; but the reason
that is given, is not because that no
notice is requisite, but because notice
is implied in these words *revocavit*
& abrogavit, as in the words *feoffavit,*
dedit & dimisit, a livery is implied.

But it was resolved that without
notice, it is no revocation of the au-
thority; and therefore if there were
no notice in this case (saith the Booke)
the defendant ought to have taken
issue *quod non revocavit &c.* and if
there were no notice it shall be found
for the defendant. I have done with

the countermand of the authority the next thing to be considered is.

What an arbitrement is.

An award or an Arbitrement, is nothing else but the order judgment and decree of the Arbitrators upon the matter or thing in controvercy referred or submitted unto them by the parties for their determination, thus in short you see what an Arbitrement is, the next and maine scruple or question will be.

What Arbitrement is good in Law and what not?

An award or an Arbitrement may be void in Law in severall respects, and first.

Where the award is not according to the submission.

And this threefould either in respect of the *persons things submitted, or the circumstances of the submission.*

and

And first an award may be void where it is not according to the submission in respect of the persons; that is where it doth award a thing to be done by or to a stranger who is not party to the submission.

In 22. H. 6. the case is thus; in debt upon a bond to stand to an award the defendant pleaded that the Arbitrators did award him to pay 20 shillings to R. a stranger, which he paid, in this case by the opinion of the whole Court, the award was void. 22. H. 6. 46. 8. E. 4. 1. & 9. 36. H. 6. 8. acc.

So in 17. E. 4 two submitted themselves to the Arbitrement of I S of all Trespasses &c. who awarded that the one should pay to the other 40 l. 10 l. in hand, and that he should find three severall sverties, every one of them to be bound with him in 10 l. to pay the 30. l. residue at a certain day, by the whole Court, the award was void, as to the finding of the suerties which were strangers to the submission. 17. E. 4. 5. 19. E. 4. 1. 18. E. 4. 22 b. & 17. H. 7. Keilway fo. 45. pl. 2.

And therefore certainely that opinion in 5. H. 7. cannot be Law, where it is admitted that an award to make a feoffement to a stranger is good

Mich. 28. & 29. of the Queen in the Kings Bench, Rot. 476.

Moore and Bedels case was thus, *Bedel* recovered by default in an Action of Waſt againſt *Moore* 45 l. damages, after which judgment, they ſubmitted themſelves to an award, the arbitrators award that *Moore* ſhould pay to *Bedel* 10 l at certaine daies, and 15 l at certaine other dayes, and that for the payment of the 15 l. one *William Salter* ſhould be ready to ſeale and deliver 15 obligations &c. and that the ſaid *William Salter* ſhould doe other things, not within ſubmiſſion.

Paſch. 34 & 35 of the Queen in the Kings Bench. Rot. 2417.

In this caſe it was adjudged that as to all that was to be done by *William Salter*, being a ſtranger to the ſubmiſſion, the award was void, for they are not bound to performe any award but that which is within the ſubmiſſion. ſo likewiſe it was adjudged betwixt *Eccleſſield and Maliard* in the Kings Bench.

Trin. 4. of the Queen Dyer. fo. 216. b.

Two ſubmit themſelves to the Arbitrement of *A.* who Arbitrates thus, the award of A. indifferently choſen by I. for the behalfe of the obligor of one parte, and the oblige of the other parte, &c. the doubt was whether the award

award were betwixt the parties or no', but it was ruled that it was, because that I. was not party to the award, but a deputy or factor &c.

A. and B. were bound to stand to the arbitrement of I.S. concerning a matter in controversie which did arise of the part of the wife of B. before coverture, I. S. awarded that A. should pay so much to B. and his wife. In this case it was moved by *Seriant Rolls* that the award of paiment of mony to the wife was out of the submission, and therefore nought. Trin. 16. Car. in the *Kings* Bench.

But by the whole Court the award was held good, because it doth appeare upon the submission that the controversy did arise on the part of the wife.

Secondly, an award may be void, where it is not according to the submission, in respect of the things or matters submitted.

If one be chosen arbitrator to make an Arbitrement upon one thing, and he makes an Arbitrement upon another thing, the Abitrement is void. Pl. Com. fo. 396. a.

In the case of *Moore* and *Bedel* cited before,

before, who submitted themselves to an Arbitrement of all matters in varience betwixt them; the Arbitrators award (amongst other things) that whereas *Bedle* being possessed of a certaine coppy hould houlden of the Mannor of L. in the County of B. had made a Lease for years of the said Copihould by Indenture contrary to the Custome, that one *William Salter Pro Posse suo* should cause that no advantage should be taken of the forfeiture, in this case it was adjudged that the award concerning this Coppihould not being within the submission was void.

7. El. 8. of the Queen Dyer fo. 242. pl. 52

Two submitted themselves by recognisance to an Arbitrement, of the right and interest of 200. Acres of Land, &c. the Arbitrators award that the Defendant should have Brakes during his life in the land, resolved that the award was not according to the submission, because that, that was of the right and interest in the land; and the award is only of parcell of the profits out of it.

2. R. 3. 12. b. 12. E. 4. 25. b. Coke lib: 5. fo. 8. 2

If *I. N.* and three others put themselves upon an award of *I. S.* of all

Actions

Actions and demands betwixt them. In this case the Arbitrator hath good authority to make an award of all joynt matters betwixt them, and of all severall matters also: but he cannot arbitrate any matter betwixt the three only, because they are one party against the fourth, but he may determine betwixt any of the three and the fourth.

In 9. E. 4. two submitted themselves to the arbitrement of one *I. L. de omnibus actionibus personalibus fictis & querelis*, &c. betwixt them, &c. who awarded that, because the Defendant had committed divers offences to the Plaintiffe, and that the Plaintiffe was seised of such a house in Fee, that the Defendant should release to the Plaintiffe, all the right which he hath in this house, &c. 9. E. 4. 43. b. 44. c. 36 M. 6. 8. et 11. acc.

In this case I conceive the better opinion to be, that the Arbitrement is void, because that the power of the Arbitrator who is a Judge privatly chosen by the parties, shall be taken *stricti juris*, in that thing onely of which the compremise is, and not in another thing; and here the compremise

mise was but of a thing personall, and the Arbitrator hath awarded a satisfaction reall, to wit, a release of a right to a house, which was not comprised within the submission.

And *Littleton* in this case said, that if he had awarded that the Defendant should serve the Plaintiffe two yeares, this would be void.

And by *Choke* if we put our selves in Arbitrement *de jure, titulo, & possessione Manerij de Dale*, and the Arbitrator makes an award of the Manor of Sale, this is void.

Trin. 33 Iac. in the Kings Bench, Rot. 216. *Haynes* against *Arnsteed* in Debt upon an obligation to stand to an Arbitrement in all causes that have been depending betwixt the parties *ab initio mundi*, the award is that the Defendant shall release all causes to the Plaintiffe from the beginning of the world, *usque &c. Tanfield Iustice* that the award is void for it is, that the Defendant shall release all causes generally; and the submission is of all causes depending then, and so the award void, and then the obligation not forfeited, *quod Curia concessit*; and judgement was given for the Defendant.

In

In a Writ of Error upon a judgement given in the Common Bench in debt upon an obligation to ſtand to the award of *I. S.* concerning an action of account pending, the arbitrator made an award touching the account; and further awards that every of the parties ſhould releaſe to the other all Actions; the error in point of Law was that the award was void, for though the Arbitrement may be good in part and void in part, yet if it be void in any part, the obligation is void; *quod non allocatur*; for *per curiam* when the award is made for more then is ſubmitted (as in this caſe) it is good for the thing ſubmitted; and void for the ſurpluſage, but if the award bee made of leſſe then is ſubmitted, then it is void for the whole. Mich. 7. Jac. in the Kings Bench, Cornelius Lawrence & Carres Caſe.

An award made for more then is ſubmitted, is good for that which is ſubmitted and void for the reſidue.

If divers Covenants be, and a man is bound in an obligation to performe them, and ſome of the Covenants are void and againſt Law, and the reſidue good, yet he ought to performe thoſe that are good, otherwiſe the obligation is forfeited, and this was one Alderman *Lees* caſe, *vide* 14. H. 8. where-

wherefore judgement in this case was affirmed.

Hob. Rep. pa. 267. pl. 333.

Goffe against *Browne* upon an Obligation dated the 23 of *February* to performe an award of all causes untill the day of the Date of the Bond. The Defendant pleaded that the Arbitrators made no award. The Plaintiffe replyed that the 28 of *March* following they made an award, *de & super premissis*, that the Defendant should pay the Plaintiffe 20.l. at Midsummer following, in full satisfaction of all matters between them, and that they then should make the one to the other generall releases of all matters betweene them, and assigned the breach for the non-payment of the 20.l. The Defendant demurred; because the award did seeme to exceed the submission, being for discharge and satisfaction of all matters to the day of the award, which was more then was submitted, for it may bee that the Arbitrators might meane some part of the 20.l. in discharge of the causes that might arise betweene the 23. of *February*, and the 28. of *March*, which were not within their

their power, and ſo for the releaſe.

Yet judgment was given for the Plaintiffe either becauſe *de & ſuper Premiſſis* may import a reſtraint to the thing ſubmitted, or elſe that no new cauſes ſhall be ſuppoſed except they were alledged. * as in pleading of awards of cauſes they neede not averre that theſe were all, &c.

* Coke lib. 8. fo. 98. Baſpoles caſe.

There was a caſe which was betwixt *Robert Tiderby* the Father and *Robert Tiderby* the ſonne, which was thus; they bound themſelves to ſtand to the award of I. *S.* concerning all controverſies, quarrels, and debates right title, and poſſeſſion of, or concerning the Mannor of Dale. I. S. awarded a convayance of the Mannor of Dale to certaine uſes, and that *Robert Tiderby* the Father ſhould deliver all evidences, and charters concerning the Mannor.

Mich. 9. Iac. in the Kings Bench.

In this caſe it was objected that the delivery of the evidences was not within the ſubmiſſion; for they are neither the right nor title, nor poſſeſſion of the land. To which it was ſaid that the charters are the nerves and ſineives of the land, and therefore

therefore with in the words right and Title, for without the charters, neither of these can be maintained also by 8 H.6 & 16E.4. Where Arbitrators have power over the principall, they have power over the accessory; and therefore the right and Title of the Land being put to the award of I. S. which is the Principall, he hath power to make an award of the Charters which are the accessory.

Againe, an award may in some cases be void, where it is made of parte onely of things or matters contained in the submission and not of the whole.

In 19.H. 6. two submitted themselves to an award upon the right title and possession of Land; the Arbitrator made an award of the possession only; which was objected by *Yelverton* to be nought, because it was of part of the thing in submission onely. But by *Newton* if two submit themselves to an award of all Actions reals and personals, and an award is made of all Actions personals onely, this is good and so was the opinion of the whole Court.

In 39. H. 6. by *Prisot* where two or

or three things are put in arbitrement joyntly, and an Award is made of part, and not of the whole, this is a void award. 39 H.6.9.

And in 22 E.4. where the submission is of all treſpaſſes, betwixt *A.* of the one part, and *C.* and *D.* of the other part; and an award is made, that *A.* ſhall pay 10 l. to *C.* and ſaith nothing of *D.* yet it is a good award: for it may be that *A.* hath offended *C.* and hath not offended *D.* 22 E.4.25 2 R.3.18. b.ac.

Which books, and all others to this purpoſe, muſt bee underſtood with theſe differences: Firſt, where the ſubmiſſion is by Deed, and where without Deed: where it is without Deed, there the award may be made of part only, and good. Coke lib. 8.fo.98. Baſpoles caſe. Trin. 4. of the Queen Dyer. fo. 216.b. & 7 & 8. of the Queen. Dyer fo. 242.pl.52.

Again, where the ſubmiſſion is by Deed, there is this difference to be obſerved; where the ſubmiſſion is generall of all matters, &c. or in ſpeciall, of ſome particular things only, with an *Ita quod*, or *Proviſo*, the award be made *de premiſſis*; or that the ſaid award be made and given up by ſuch a time: and where the ſubmiſſion is general or ſpecial, without

ſuch a conditional concluſion. For in the firſt caſe the award muſt be made of all the matters ſubmitted, becauſe of the conditionall reference, and in the laſt the award may be made of part only, and good.

So it is (where the ſubmiſſion is not conditionall) in caſe of divers particular perſons (as the caſe is put before) if two of one part, and one of another part ſubmit themſelves, the arbitrator may make an arbitrement, betwixt the one of the two of the one part, and the other of the other part, and good.

But note Reader, that there is this difference to be obſerved betweene pleading of an award upon a ſubmiſſion general conditional, and pleading of an award upon a ſubmiſſion ſpecial conditional.

Baſpoles caſe, *ubi ſupra.*

For in the firſt caſe, if an award be pleaded *de premiſsis modo & forma ſequentibus*; and alledged to be upon one ſingle matter in controverſie, this is good; becauſe it is ſhown that the award was made *de premiſsis*, which doth import an award of all that which was referred to the arbitra-

tors;

tort; and ſo it ſhall be intended, untill the contrary be ſhewn by the other party: for when the ſubmiſſion is generall, *Generale nihil certi implicat*; and it may well ſtand with the generality of the words, that there was but one cauſe depending in controverſie betwixt them.

But in pleading of an award upon a ſubmiſſion ſpecial conditional, there the award muſt be expreſly alleaged to be made of all things within the ſubmiſſion, or otherwiſe it is nought, becauſe upon the very face of the award it will appear, whether it were made of all things in the ſubmiſſion or no. For if the ſubmiſſion be of ſeveral things in ſpecial, and an award pleaded only of one, it is apparent that the award is not of all matters contained in the ſubmiſſion.

Again, if upon the pleading of an award upon a ſubmiſſion general conditional it doth appear either upon the ſhewing of the other party (as hath been ſaid) or by the award it ſelf, that it was not of all matters in controverſie in ſuch caſe alſo, the award will be void, though the ſubmiſſion

were general, becauſe that it was conditional.

Trin. 4. of the Queen Dyer, fo. 216. b.

Mote and *Menerels* caſe in my Lord *Dyer* was thus, they were bound to ſtand to the award of *A.* for Dilapidations, &c. and all other ſuits, quarrels &c. *Ita quod*, the ſaid award were made, &c. who made an award of the Delapidations, with a proteſtation that hee would not meddle with the reſt. In this caſe the opinion of the book is, that the award is nought, for that it did not extend to all the points in the ſubmiſſion, for he made no arbitrement of the ſuits and quarrels, &c. but made an expreſſe proteſtation that he would not meddle with them; by which he hath diſabled himſelf to be an arbitrator in the premiſes, becauſe that he refuſed to make an arbitrement according to the ſubmiſſion of the parties, who choſe him for to arbitrate, conditionally *ut ſupra*: *viz.* So that the ſame award, &c. which is as well of ſuits and quarrels, &c. as of dilapidations.

In this caſe, though the latter part of the ſubmiſſion were generall, yet becauſe it was conditional, and it did appear

appear by the award it self, that it was not made of all things submitted, therefore the award was not held void.

But in this case I conceive, that if the award had been of the dilapidations generally, without the protestation, that it had been good enough, because that the latter part of the submission is general: and therefore if the award had been pleaded *de premissis*, and aleage the award of the dilapidations, it shall be intended that this was all the matter in controversie betwixt them, untill the contrary be shewed.

There is one thing yet in *Baspoles* case worth the noting, which I cannot omit: where it is adjudged, that though there are many matters in controversie, yet if one only be notified to the Arbitrator, he may make an award of this; for the Arbitrator is in place of a Judge, and his office is to determine *secundum allegata & probata*; and the duty of the parties which are grieved, and know their particular griefs, is, to give notice of the causes of controversie to the Arbitrator, Coke lib. 8 fo. 98. a.

An arbitrator may make an award of one matter only, if he have notice of no more.

bitrator, for they are privy to them, and the Arbitrator a ſtranger, and every one ought to do that which lies in his notice.

And if other conſtruction ſhould be made, moſt arbitrements might be avoided: for the one might conceale a treſpaſſe done, or other ſecret cauſe of action given him, & ſo avoid the arbitrement, *& expedit. reipub. ut ſit finis litium.* I ſhall cite but one caſe more upon the former ground, and ſo paſſe this, which is thus.

Hob. Rep. p. 267. pl. 334. An arbitrement ſeeming not ſo large as the ſubmiſſion.

Barnes brought debt upon an Obligation againſt *Greenly*, dated the 4 of September, to performe an award of all cauſes, till the day of the date: the Plaintiffe pleaded the award *de premiſſis*, viz. of all cauſes till the 3 of December, and aſſignes a breach: the Defendant maintained the Bar, that the Arbitrator made no award, and verdict for the Plaintiff & judgement: here the award was a day ſhort of the ſubmiſſion. Upon this a Writ of Error was brought, but what iſſue it had, that my Lord *Hobart* ſaith, he doth not know.

I doe conceive, Reader, that the difference

difference formerly taken, will resolve this case; for if the submission were conditional, then I think the award is nought, being not so large as the submission; but if it were absolute, in such case I think it good.

But to this it may be said, that the Law will not intend any other matter of controversie to arise betwixt the third of September & the fourth, without it be shewn; and for ought appears, the award is of all causes to the fourth of September, because no other cause appeares then what is awarded: therefore *quare.*

Thirdly and lastly, an award may be void, where it is not according to the submission in respect of the circumstances of it.

Page and *Parkers* case was thus, in debt upon a bond conditioned for the performance of an award, so that it be delivered in writing *sub manibus & sigillis, &c.* the defendant pleaded the delivery of it in writing, and doth not say *sub manibus & sigillis*, and a performance, the plaintiffe alleaged a breach, and judgement given for him, which was reversed in the Che-

Page and Parkers case in the Kin. Bench

quer chamber, because the Defendant did not plead the award *sub manibus & sigillis*; for if an arbitrement bee not made according to the submission, it is no arbitrement; if no arbitrement, no cause of action.

1 H.7.5. 7 & 8. of the Queen Dyer, fo. 243.pl.56 31 H.8. Br. arbitr. 42. 2 R.3.13. pl.32. & 8 E.4. 11 a.

So in this case I conceive, if the award had been pleaded *sub manibus*, and not *sub manibus & sigillis*, it had been nought.

So likewise, if it had not been pleaded that it was delived in writing, it had been void.

And where there is a submission to an award, so that it be made and delivered to the parties in writing, at or before such a day: in such case, if it have not all the circumstances, that is, though it be made, yet if it be not delivered; and though it bee made and delivered, yet if it be not delivered to the parties, and though it be made and delivered to the parties, yet if it be not in writing; and though it have all these circumstances, yet if they be not all done, at or before the day, in any of these cases the award will be void, as appears by the books in the margent.

And

And if the Arbitrators award any thing after the time limited, it is void. 8 H.6.f.18

Two of one part, and two of another ſubmit themſelves to an award, ſo that the award be made and delivered to both parties, &c. A delivery in this caſe to one of either party is not ſufficient, but it muſt be to both the entire parties. Coke li.5. fo.103. Hungates caſe.

The reaſon of all theſe caſes may be becauſe (as I have formerly ſaid) that it is but a bare power or authority which is given to an Arbitrator, and therefore it muſt be ſtrictly executed according to the qualifications and conditions annexed to it.

But the reaſon that comes more cloſe is, becauſe that the ſubmiſſion is conditional; *Ita quod*, or *Proviſo*, the award of the premiſes, or the ſaid award, &c. now it cannot be an award of the premiſes, or the ſaid award, if it be not in every thing matter, and circumſtance, agreeable to the ſubmiſſion. And now *I* have done this part, of ſhewing you where an award ſhall be void, in regard that it is not according to the ſubmiſſion.

I ſhall now ſhew you before I go any further, what I intend by ſaying that the arbitrement is void, and hereupon I ſhall make this *quare*.

In what caſe an Arbitrement ſhall be totally void, and where in part only.

And here I ſhall lay down theſe three ſeveral grounds or differences, all warranted by our books.

22 H.6.46 36.H. 6.1 17.E.4 5 19.E.4. 1. pl. com. fo.396.a. Coke lib:8 fo.98. Baſpoles caſe 4. of the Queen Dyer fo. 226.b. Coke lib. 5.fo.77. Salmons caſe. Rudſton & Yates caſe cited afterwards

Firſt, where the award is of one ſingle matter only, or of many things, all out of the ſubmiſſion, in ſuch caſe the award is totally void.

Secondly, where the award is of one ſingle matter only, or of many things, all within the ſubmiſſion; yet if it be not of all ſubmitted, where the award is conditional, or not agreeing in circumſtances (as I have ſhewed you before) or if it be uncertain, impoſſible, &c. though but in part (as I ſhall ſhew you hereafter) in ſuch caſes likewiſe the award will be totally void.

Thirdly, and laſtly, where the award is of one thing onely, or of ſeverall

verall things, part within the ſubmiſſion, and part out, there the award is void onely as to that which is out of the ſubmiſſion, and good for the reſidue. 17.E.4.5. 18 E.4. 22.b. 19 E.4.1. 21 E.4.75 17 H.7.

To theſe caſes that I have cited, *I* ſha'l only addc one caſe remembred before, and that is *Cornelius Lawrence* and *Carres* caſe, which was thus: They ſubmitted themſelves to the award of *I. S.* concerning an Action of account pending; the Arbitrator made an award touching the account, and further award, that every of the parties ſhould releaſe to the other all actions. In this caſe it was adjudged that the award was good, as to the account, which was ſubmitted, and void for the ſurpluſage. See fol. 9. b. Keilway 43 & 45. Moore & Bedels caſe before

But note, *Reader*, that though an arbitrement may be void in part, and good in part as in the caſes aforeſaid, yet it cannot be totally void, as to one of the parties to the ſubmiſſion, and good againſt the other; for as the award muſt be on both ſides (as I ſhall ſhew you hereafter) ſo I conceive the award muſt be equally and reciprocally

An award voide againſt one of the parties, is voide againſt both.

reciprocally obligatory to both parties, and if it be void againſt one, it will be void againſt both.

In *Oſburns* caſe. Coke l. 10. f. 131

And I conceive that *Moore* and *Bedels* caſe cited before, will warrant this: The caſe was thus, *Bedel* recovered by default in an action of Waſte, againſt *Moore* 45. l. damages, and had judgement, after they ſubmitted themſelvs to an arbitrement, and an award is made that *Moore* ſhould pay to *Bedel* 10 l. at certain dayes, & 15 l. at certain other dayes; and that for payment of the 15 l. one *William Salter* ſhould bee ready to ſeal and deliver 15 Obligations, and the award was of other things alſo out of the ſubmiſſion: and in conſideration thereof, that *Bedel* ſhould diſcharge *Moore* of 20 l. parcel of the ſaid 45 l. recovered in the ſaid Writ of Waſte, and that upon the readines of *William Salter* to ſeale and deliver the ſaid 15 Obligations, *Bedel* ſhould releaſe to *Moore* all actions and demands, &c.

In this caſe *Moore* brought an action againſt *Bedel*, & ſhewed how that he payed the 10 l. &c. and aſſigned

a

a breach of the award, that the Defendant had not made the releaſe upon requeſt.

It was reſolved, that though that many things are awarded to be done in ſatisfaction of another, (as in this caſe) and ſome are within the ſubmiſſion (as here the payment of the mony) and ſome out (as in this caſe, all to be done by *Salter* being a ſtranger) and ſo void; and though that all were intended by the Arbitrators to be one full and entire recompence, for the things that the other ſhould doe in conſideration of this (as here the diſcharge of the 20 l. and the releaſe by the Defendant) notwithſtanding if any to be done or to be given to the party, though that it be of ſmall value be within the ſubmiſſion, the award is good; ſo in this caſe judgement was given for the Plaintiffe.

In this caſe it is apparent, that if what was awarded on the Plaintiffes part, had been all out of the ſubmiſſion, and by conſequence void, that then the Defendant in ſuch caſe had not been tyed to perform what was awarded

awarded on his part, for an arbitrement void against one, is void against both.

Hil. 15. Car. in the Kings Bench. Rot. 113.

Rudston and *Yates's* case cited before: an Infant and one of full age submitted themselves to an award, it was adjudged that the submission, and by consequence the award, were absolutely void as to the Infant; and being void as to the Infant, that it was likewise void as to the man of full age; for that the award ought to be equally binding.

And now I have shown you where an arbitrement shall be void in the whole, and where in part only: It will be necessary that I shew you, where a bond for not abiding such an award shall be forfeited, and where not.

Where an Obligation shall be forfeited for not performing of an Award, which is void in part or in the whole, and where not?

The Law as to this, takes this difference, betwixt an award void in the

the whole, and an award void in part only. Where the award is totally void, there the bond can never be forfeited or the non-performance of it: because, that a void arbitrement and no arbitrement, are both one in the judgement of *Law*.

And therefore no more then a bond can be forfeited, where there is no award made, can it be forfeited where there is a void award made. For as in the first case, he cannot observe that which is not; so in the last, the Law requires not the observation of that which is void. Coke l. 6. 10. f. 131. b 7 H. 8. Keilway, fo. 175. a.

As for the book in 22 *Hen.* 6. where there was a submission by bond, and an award to pay 20 s. to a stranger; and it is there said, that the judgement of the Court was, that though the award were void, yet it ought to be performed by reason of the bond; for otherwise the bond is forfeited: and therefore saith the book, the Plaintiffe traversed the award, *quod mirum*, saies *Brooke* for this is no award between the Plaintiffe and the Defendant.

Well

Well might he wonder at it indeed, for certainly this cannot bee Law: but becauſe it is ſufficiently refuſed by my Lord *Coke* in his tenth book, the place cited before, I ſhall thus paſſe it. But now on the other ſide, *where the award is void in part only, there the bond may be forfeited for not obſerving the award for as much as is within the ſubmiſſion, though not for that which is not contained in the ſubmiſſion:* and therefore if a breach be aſſigned in that part which is void, the action will not lye.

Mich. 41. & 42. of the Queen in the Common-Pleas. 18.E.4.fo. 22.b.23.a. Stiles caſe 41.& 42. of the Qu. in the Common Pleas, &c.

In *Emery* and *Emerys* caſe cited before, *Glanvile* cited a caſe betwixt *Hellier* and *Rendals* in the Kings Bench in which he ſaid, he was of Counſel, where the Plaintiffe aſſigned his breach at a void matter, and after verdict for the Plaintiffe this was ſpoken in arreſt of judgement; and judgement *quod quer. nihil capiat per billam.* But now a breach may be aſſigned as to that which is within the ſubmiſſion, and the bond forfeited for it.

In 18 E.4. it was awarded that one of the parties ſhould pay 40 l.

to

to the other, 10 *l.* in hand: and that he and three others ſhould be bound for the payment of the thirty pound reſidue. In this caſe by *Brian*, *Neale*, and *Choke*, though that the award be void, as to the ſtrangers, yet it is not void as to the party which ſubmitted, but he muſt plead the award *verbatim*, as the arbitrators gave it, and in performance of it he muſt ſay, that he himſelf was bound for the payment of the 30 *l.* reſt at a day, and ſhall not ſpeak of the ſureties.

So in *Cornelius Laurence* and *Carres* caſe cited before, it was adjudged, that where there is an award of more then is ſubmitted, it is good for that which is ſubmitted, and void for the ſurpluſage, and that the bond is forfeited for not performance of that which is within the ſubmiſſion. See fo. 9. b. Mich. 7. Ioc. in the Kings B.

In 17 H. 7. by *Vaviſor* and *Fromwick*. If *A. B.* be bound to ſtand to the award of certain perſons of, &c. who award that the ſaid *A. B.* and *E.* his wife ſhall levie a fine of the ſame lands to the other party, though that the award be void as to the wife of 17 H. 7. Keilway, f. 43. pl 10 & 45. pl. 2.

In *Osborns* case. Coke lib. 10. 131. b. *A. B.* yet the said *A. B.* is bound upon pain of forfeiture of his bond, to do it. And agreeing with these cases, is *Moors* and *Bedels* case so often remembred before.

And we must observe, that where a man is tyed by promise to stand to an award, it wil be the same with the Obligation, as to those things before laid down, as you may see in *Moors* and *Bedels* case.

And now having declared unto you in what case a bond shall be forfeited for not performing of an award, and in what not. It will be necessary in the next place (before I proceed) to clear the point of notice of the arbitrement; that is,

Whether the Compromittors which have bound themselves to stand to an Award, are bound to take notice of it at their own peril or not?

8 E. 4. 7. 20. 13. & 21. This very point is as much controverted and debated in 8 Edw. 4. the Dutches of Suffolks case, by all the Judges in the Chequer chamber, as it

is possible for a case to be: and thee
s as much variety of judgement and
pinion in it, as ever I met with in
ny one case of the Law.

And though I do conceive the bet-
er opinion in that case to be (for it
s not resolved) that the party who
ath bound himself to stand to the
ward, must take notice of it at his
wn perill: Because as *Catesby* saith
xcellently well, though that a man
y reason shall not be compelled to
o a thing without having notice of
t, yet a man may binde himself by
is deed to do a thing, the which by
eason he should not be bound to do.

Yet I conceive the judgement of
hese learned men, viz. *Fairfax*, *Star-*
ey, *Yelverton*, and others, ought not
o be so undervalued, especially upon
no lesse then four severall debates of Coke lib: 8
he point, as to be called a sudden o- fo. 91. b
pinion, as it is in *Fraunces* case in my
Lord *Cokes* 8 book. But for the Law
in this point, certainly it is now set-
let and in peace, that the Compro-
mittor must take notice of it at his
own perill, having bound himself to
stand to and observe the award.

1 H.7.f.5. In 1 Hen. 7. the opinion was clear (ſaith the book) that the Obligor ought to take notice of the award at his own peril, becauſe he hath bound himſelf ſo to do.

18 E.4.18 a. And in 18 E.4. by *Brian*, *Vaviſor* and *Catesby*, Juſtices; where an award is made, the party ought to take notice of it at his own perill, and they ſay, that ſo it was adjudged in the time of the ſame King, in the Kings Bench.

Coke lib.4 fo.82. & li.8.fo. 96.b. Which caſes are agreed for Law in my Lord *Cokes* 4 book, as alſo in his 8 book *Fraunces* caſe, where it is ſaid, that ſo is the Law without queſtion.

And the reaſon given there is, becauſe when a man bindes himſelf to do or performe any thing awarded by a ſtranger, he doth by this, take notice at his perill, of all things incident to this, for the ſaving of his obligation.

7 H.8. Keilway f.175.pl.8 And therefore wee may ſafely conclude the Booke in 7. H. 8. where there is an opinion to the contrary, to be no Law: but of this ſufficient. I ſhall now proceede to ſhew you in what

what respects or for what other reasons an award may be saide to be void in Law; the first ground I layde downe, was where the award is not according to the submission, the next shall be the incertainety,

Where an award shall be voide in Law for the incertainety;

In all cases where the award is uncertaine, it is void: for the arbitrators (as I have shewed before) are judges, and their judgement must be certain; for *judicium debet esse certum.* And the Law doth in all cases abhorre uncertainty, because it is the mother of confusion.

Samons case; the Arbitrator awarded, that the one of the parties should enter into a bond to the other, and doth not award in what summe the bond shall be, adjudged void for the incertainty. Coke lib. 5.fo.77.b. & 78.a.

For, as the book saith, the arbitrators are judges of the case, and their judgement awarded, ought to be certain, so that by this the controversie be decided, that it may not bee the cause

cause, through the uncertainty of new controversie.

Mich. 4. Jac. in the Kings Bench. Rot. 32.

Martham and *Jennings's* case, in debt upon an Obligation to stand to the arbitrement of *Poly* of Grayes Inne, for the title of Coppy hold in question betwixt the parties; *Poly* awarded, that *Jennings* should pay to the Plaintiffe 20 marks, *viz.* 6 l. 13 s. 4 d. *super vicesimum primum diem Maii*; and 6 l. 13 s. 4 d. at the Feast of St. *Michael* next following: and that the plaintiffe should release to the defendant all his right in the Coppyhold, *super predictum primum diem Maii* (omitting *vicesimum*) where there was no first day named before.

The Defendant pleaded, that there was no award made: the Plaintiffe replyed, that there was an award made, and sets it forth; and that the Defendant hath not paid the 6 l. 13 s. 4 d. upon the first day of May: the Defendant demurred, intending that the arbitrement was void for the uncertainty, *viz.* in that it was to be paid *super predict. primum diem Maij*, where there was no first day named before. *Tanfield* Justice, the arbitrement

trement is void in the whole; because that the day to which the release is referred to be made is uncertain, and so it doth not appear when it shall be made: and for that it doth appear, that the intent of the arbitrator was, that it should be made at a day certain, and this is not certainly expressed, it is void. And though that the arbitrement consists upon divers parts, and some are certain, yet if any part be uncertain, all is void, if it be materiall and concern a party to the submission, as here it doth. And it is not like the case of 19 E. 4. 1. for there the award which was void for part, that part concerned a stranger not party to the arbitrement, but here it concerns both parties to the arbitrement. And though that there be another clause, that the Plaintiffe shall make further assurance; yet his intent was, that the other should be also done: and because that that is void for the uncertainty, all is void: for an award is like a judgement, which if it be imperfect in any part, it is void for the whole; and after, judgement was given for the Defendant. Note

Note here *Reader*, that if an award be made of severall things, all within the submission; if it be uncertain in part onely, it is totally void, which doth agree with the differences which I have formerly layd down.

8 E.4.11.a In 8 E.4. cited before, by *Yelverton*: if an award be made, that an action shal be conceived betwixt the parties, by the advice of S, and F, the award is void: because saith he, every arbitrement ought to be full and certain, and so it is not here, untill the said S, and F, limit the action.

I must confesse the greater opinion in this case is, that the award is good: but I conceive the opinion of *Yelverton* (as I formerly said) to bee the better opinion; because the judgement of Arbitrators ought to bee finall (as I shall shew you hereafter) and nothing ought to be referred to the judgement of other persons or to the law: for by the submission (which must be their rule) they themselves are to end al suits & controversies betwixt the parties; and if they do not, their award is not according to the submission, and therefore void.

Rudston

Rolfton and *Yates*'s case (which I have put often before, though to other purposes) was thus: an Infant and a man of full age submitted themselves to an award; the Arbitrators award, that the Infant should pay 5 l. to the other party, for *quite rents and other small things, &c.* Tis true, that in this case it was adjudged (as I have formerly said) that the submission of the Infant was absolutely void. But it was also adjudged, that the award in this case was void, because of the uncertainty of those words, *other small things*, it not appearing what those other things were: and it may bee they were such things, for which an Infant by the Law may not be chargeable: and by the same reason they have assessed 5 l. they might have assessed 20 l. Hil. 15. Car. in the Kings B. Rot. 313. 8 E. 4. 1.

Here likewise note Reader, that the award being of things within the submission, was adjudged totally void for the uncertainty of part only.

Two submit themselves to the award of *I. S.* who awards, that one of the parties should pay a certaine sum to the other, and that the other in Pasch. 15 Car. in the Kings B.

in consideration of this, should discharge him of a bond in which they two were bound to a third person in an 100 l. *aut eo circiter.*

In this case it was objected, that the arbitrement is void, because the Arbitrators have arbitrated a thing uncertain; by reason that it doth not certainly appear of what summe the bond was in which they were bound, and the *eo circiter* is utterly uncertain.

But the opinion of the whole Court was, that there was a sufficient certainty; because that lyes not in the power of the Arbitrators to know the direct sum, and a small variation is not materiall, and therefore the award was held good.

Hob. Rep. p. 68. pl. 54 *Nichols* and *Crummons* case, there the Arbitrators award, that one of the parties should pay 3 l. 10 s. to the other, and doth not say for what; so that it may appear whether it concerned him or no, it was held void for the uncertainty. And if this should not be void, it might be very mischievous to the party, for by this means he might be doubly charged. For in an

an action brought for the same thing, for which this money is awarded to be paid, I doubt the arbitrement could be * no plea in bar of the action; because it cannot appear, whether it were for the same thing or no. And the averrement of the party can never declare the intent of the Arbitrators, and so help the uncertainty or other imperfection in the arbitrement, as it is agreed in this case, and resolved also in 7 and 8 of the Queen, *Dyer*: and in *Girling* and *Gosnolds* case, here immediately following.

* *Tamen quare*, because Hob. Rep. *ubi supra*. seemeth contrary. An averment of the parties cannot declare the intent of the arbitrators. Mic. 7 & 8 of the Queen, Dyer fo. 242. pl. 52 Pasch. 4. Jac. in the Kings B. This case commenced Pasch. 3 Jac. Rot. 478.

Girling and *Gosnolds* case in the Kings Bench was thus: Debt was brought upon a bond for not observing of an award; which was, that the Defendant should pay to the Plaintiffe 20 l. *per annum*, during the continuance of two leases for yeares in being of the Parsonage impropriate of Yarmouth, &c. and it was not showne in the award for what tearm the leases were; but the Plaintiffe shewed for what tearme they were, and the continuance of them; and alleaged a breach for non payment of the 20 l. &c. In

In this case it was objected, that the award was void for the uncertainty, because that it did not expresse for what time or tearme the leases for yeares were, and that it could not bee aided by the averrement of the party: and for the uncertainty *Samons* case was cited; for the averment my *L. Dyers* case which I put you before.

But by *Popham* Chief Justice the award is good: he agreed that where the award is uncertaine, it is void: and that the parties can never aid it by an averrement; to shew the intent of the Arbitrators, if it be not expressed in the award, either directly, or by circumstance.

An award which doth refer, or may be reduced to a certainty, is good.

But he said that if *Samons* case in *Cokes* 5. book had been, that the party should be bound in such a sum, as hee was bound in to stand to the award, or by other reference, so that it might be reduced to a certainty, and this infallibly; in such case the award had been good.

And in this case the payment of the 20 *l. per annum* is referred to the continuance of the leases, which is certain;

certain; and therefore he conceived the award to be good. Of the same opinion were *Williams*, *Yelverton*, and *Tanfield*, Justices.

Here Reader you may observe that an award which is referred or may be reduc'd to a certainty, is good enough, agreeing with that rule in law, *certum est quod certum reddi potest.*

This shall suffice, to shew you in what case an award shall be void for uncertainty. The next thing considerable is,

Where an Award shall be void in Law for impossibility.

Whereſoever the Arbitrators award a thing impossible to be done, in such case the award is void, and by consequence the bond not forfeitable for the non-performance of it (as I have shewed before) for it were a most unjust and unreasonable thing for to make a man incurre a penalty for the not doing of that which is in it self impossible to be done.

In 8 E. 4. by *Yelverton*; if an arbitrement be made to do a thing im- 8 E. 4. 10. a.

possible,

possible, the party for the nonperformance of this shall not lose his Obligation, notwithstanding that hee bee bound to stand to the arbitrement, because he cannot by any possibility do it.

As if they award that I shall make the Thames to run over the seller of Westminster within a day: or that I shall pull down *Pauls* steeple with my hands within an hour, or the like impossibilities; because I cannot performe it, I am excused of my Obligation.

3.E.4.1.b & 12.b 9 H.6.16. by Keble. 19.E.4.1. by Nele. & 22 H.6 46.ac.

So in 8 E.4. by *Moile*: if the arbitrators award a thing impossible, as if I put my self upon an arbitrement this day, and they award, that I shall pay a sum certain at a day which was before the submission; I shall not forfeit my Obligation for the nonperformance of this arbitrement, because that it was impossible to be performed.

21 E.4.40 a.

In 21 E.4. by *Genney*: if an award be, that I shall release all the right which I have in the Mannor of I, S. in the County of M, to *Pigot*, or levie a fine to him, and in truth there is no such

such Mannor; this award is void, because it is impossible.

So if the award be, that he shall release his suit against B. and he hath no suit against him, this is a void award. 21 E.4.38 39.

But note Reader. *Where the thing awarded is in it self feasable and possible to be done, though in relation to him that is to do it, it may not be possible; yet because it carries with it no apparent impossibility, the award in such case is good.*

If the Arbitrators award, that hee shall pay a 1000 Marks presently, he is bound to do it: and it is the folly of the party to put such confidence in the parties that are chosen arbitrators. 8.E.4.1. by Moile.

So they may arbitrate things, the party cannot do (which are the very words of the book) as that the Defendant shall pay 10 l. in money, where peradventure hee never had 10 d. Or that he shall pay 20 Tunnes of wine, or the like; where he hath not one: in these cases the award is good. 19 E.4.4. by Nele & Choke.

In debt upon a bond, to stand to an award, 9 H.7.15. b.

award; the Defendant pleaded, that the Arbitrators did award that the Defendant within eight dayes after the award should go to the house of Sir *Henry Collet*, and that he should bring a bale of Woad, &c. and the Defendant saith that there was not any bale of Woad in the house of the said *Henry Collet*, within eight dayes after the said award.

By *Keble* this plea is not good; because he hath bound himself to it and to the award, and to perform it, which he must do, otherwise his obligation is forfeited. Besides this is a thing feasable, for though Sir *Hen. Collet* had not any bales in his house, if he would have performed the condition, he ought to have bought certain bails, and to have brought them to the house of Sir *Henry Collet*, &c. and then departed &c. and because he hath tyed himself to perform the arbitrement, he ought to do it, if it may be by any possibility done.

The reason of all these cases is, because it is the folly of the parties to make choice of, and to put so great confidence in such persons, whom they

they chose to be their arbitrators, and it is no newes that a man should suffer through his owne folly.

Againe, where the thing awarded is in it selfe possible, and possible also as to the party who is to do it, yet,

Where the thing awarded lies not in the power of the party himselfe, without the aide of a third person, in such case the award is void.

Two submit themselves to an arbitrement, the arbitrators. award that one of them shall make I. S. to pay 20.l to the other the award is void: because in this case it lies in the will of I.S. whether he will do it, or no, and the party hath no meanes to enforce him. 8 E. 4. fo 2 a by Yelverton 22 H.6. 46.ac

Two submit themselves to the award of I.S. who doth award one of the parties to pay to the other 40 l.10.l.in hand, and for the 30 l. residue that he finde three severall persons to be bound every one in 10.l.to the party. 17.E 4 fo 5.b 19 E. 4 fo 1.

In this case by the opinion of all the Iustices, the award was void.

And there it is said that in an arbitrement the Law intends, that the arbitrators should be indifferent and equall judges betwixt the parties: but what indifferency is this, to cause a man to make such a thing to bee done, which lies in the will of a stranger whether he will do it or no.

As put the case (saith the book) that an arbitrator will award that I must cause the King to giue the tower of London to the other, such an award is clearely void.

19 E. 4. 5. 5 H. 7. 22. b. ac. Where I may do the thing awarded my selfe, or inforce it to be don, the award is good.

And by *Brian* in 19 E. 4. an arbitrement that the party before such a day shall * levie a fine before us, is good; but if the arbitrement be, that he shall command us to sit here, and to make him levie a fine, this is void for he hath not power to do it.

5 H 7. ubi sup. a. 21 E. 4 36 ac.

So in 5 H 7. an award, that the parties shall discontinue and make Retraxits of their suits, is good: the reason of these cases, I conceive may be, because that though these things cannot be done without the act of Court, yet heere is concurrence of the act of the party also, which doth produce the act of the Court.

And

And *Hussey* Cheife Justice in 21 E. 4. takes the true distinction, sayes he there, where the act may be done by my selfe, without the aid of a third person, in such case I ought to do it; but where it cannot be done without the aid of a third person, there it is otherwise. 21. E. 4. fo 4.

There was a case which was 15 of this King, which I cited before to another purpose, which was thus; an award was made, that one of the parties should pay a certaine summe to the other, and that the other in consideration of this, should acquit him of a bond, in which they were both bound to a third person in a 100 l. &c. Pasch 15 Car. in the Kings Bench.

In this case, the award was held good, and this divesity was taken by the Court; where the arbitrators arbitrate a party to do a thing which lies in his power without the aid of a third person there the award is good, otherwise, where it lies not in his power without the aid of a third person.

And here it was agreed that the thing awarded was feasable by the

party himself, without the aid of the obligee, and this difference was taken by the Court, where the bond was forfeited, and the penalty incurred and where not, where the day of payment was not incurred, there the payment of the money at the day would bee a good discharge of the bond, and by consequence a good acquittall of the party, but where the bond was forfeited, there it could not.

And *Jones* Iustice said, that he might compell the obligee upon payment of the money, though the bond were forfeited, to deliver the bond by *subpœna* in Chancery, or that he might suffer an action to be brought against him, and then discharge and pay it.

17 E. 4. fo 5. b. According to the opinion of Iustice *Jones* in his former case it was ruled, that where arbitrators doe award, that whereas such a one was seised to my use, that I should cause him to make a release to the other being in possession, that the award was good; because that I have such an interest & power that I may compell my feoffees to do it by *subpœna* in the Chancery.

Thus

Thus you see, that where I may do the thing awarded my self, without the aid of another, or may inforce it to be done, in such case the award will be good: the next thing to be considered is,

Where an Award shall be void by reason of the not indifferency of it, or because it is made of one side only.

As Arbitrators are indifferently elected, so the law intends (as it is said in 17 E. 4.) that the arbitrators should bee indifferent and equall Judges between the parties, which they cannot be, if they do not give satisfaction to both sides, and therefore in such case, where the award is not mutually satisfactory, it is voide.

It was an ingenious saying of *Hearn* in *Emery & Emerys* case cited before; Arbitrators, saith he, are indifferently chosen, so that both the parties may have recompence in regard of their Bond, which is *equale pondus* to both: and an arbitrement, saith he,

he, is like a fine, wherein the Iudgeſ are arbitrators, one hath the land, *& pro hac concordia* the other hath money.

7 H.6 fo. 40. by Strang 20 H.6. 19 a.c. If the defendant plead an arbitrement made betwixt him and the plaintiffe of all quarels between them, &c. who award that the defendant ſhould goe quit of all actions and quarels had by the plaintiffe againſt him; and nothing is ſpoken of the quarels which the defendant hath againſt the plaintiffe, the arbitrement is void.

39 H.6 by driſcot So, if two ſubmit them ſelves to an award of all Treſpaſſes, and an award is made, that the one ſhall make amends to the other, and nothing is awarded that he ſhall do to him againe, this is a void award, becauſe all is for the one party, & nothing for the other.

12 H.7.14 15 In Treſpaſſe for taking away of goods, the defendant pleaded an arbitrement, which awarded, that becauſe the defendant had taken away the goods of the plaintiffe, that he ſhould re-deliver them in ſatisfaction of the Treſpaſſe, which he did and

and there by the better opinion the plea is nought, becauſe that re-delivery of his owne goods, can be no ſatisfaction for the taking and detaining of them.

An Arbitrement is no plea in treſpaſſe, if the defendant doe not ſay that the arbitrators awarded that he ſhould giue ſomething to the plaintiffe more, or leſſe, in ſatisfaction for that is a ſatisfaction to neither ſide; the plaintiffe is not ſatisfied for the treſpaſſe done him, nor the defendant diſcharged thereof without ſome ſatisfaction for the wrong done by him. 43. E. 3. 28

In treſpaſſe for goods, the defendant pleaded an Arbitrement that he ſhould retaine part of the goods, and ſhould deliver the reſt, which hee hath been alwaies ready to deliver and demands judgment; this is, conceived to be no plea: and this caſe was put, in debt of 10 l. the defendant pleads an arbitrement that he ſhould pay part, and not the reſt; or to pay the moity and retain the other moity, this no plea. 45 E. 3. 16

Tis true, that *Brooke* makes a *quere* B. R. Arbitrement 7.

of the caſe, becauſe it was not adjudged; but withall concludes, that it ſeems it is no plea: and certainly ſo is the Law. For if an award for the re-delivery of all the goods could be no plea, becauſe no ſatisfaction (as the caſe is in 12 H.7. cited before) much leſſe an award for the re-delivery of party only: for this is no other then to endeavour to ſatisfie one wrong with another.

9.H.7.16. a. For the latter caſe, as it is ſaid by *Keble*, in 9 H.7. that it is againſt the Law for the arbitrators to award the party to pay more then of right hee ought to pay. So certainly it is as much againſt the Law, to award the party to pay leſſe then of right hee ought to pay, for there is no equality nor ſatisfaction for that which is more or leſſe in either caſe.

Hob. Rep. pa. 68 l.p. 44. *Nichols* and *Grummons* caſe, cited before: there was an award, that the defendant ſhould depart from his houſe, wherein he dwelt, &c. and ſhould pay 3 l. 10 s. to the plaintiffe, and it doth not appear for what, &c. In this caſe it was adjudged, that the award was void, becauſe it was of

one

one ſide only. *But now, where there is either an acquittall or an expreſſe ſatisfaction on both ſides, or of one ſide only, with an implyed diſcharge of the other; in ſuch caſe the award will be good.* 19.H.6.

It is a good award, that becauſe that the one party hath done more treſpaſſe to the other, then the other to him, that he ſhall give a penny in ſatisfaction, and that the other ſhall be quit againſt him. 37.20.H. 6.19.22 H.6 39.9. E.4.44.a.

An arbitrement, that the one hath done treſpaſſe to the other, and that the other hath likewiſe done treſpaſſe to him; and therefore that the one ſhall be quit againſt the other, and that the other likewiſe ſhall be quit againſt him, is a good arbitrement. 22.H.6.39 19.E.4.8.a 10.H.6.14 19.of the Queene. *Dyer.fo.* 56.a.pl. 39

In treſpaſſe for the taking away of goods, though an award that he ſhall re-deliver the goods to the plaintiffe in ſatisfaction, be no good award; yet by *Keble* and *Tremaile*, if the award had been that he ſhould carry them from ſuch a place to ſuch a place at his own coſts, this had been good. 12.H 7.14 b.15.a.

And

Dyer, *ubi supra*, And by *Kable*, if a man take my horse from me, and we put our selves upon Arbitrement: in this case, if the arbitrators award that he shall keepe the horse untill the Feast of Easter, and then to deliver the horse; this is a good award, for he shall be charged with the meat of the horse which is a profit and availe to me: and I am discharged of the keeping and the meat of the horse, which is my proffit.

Thus you see, *That a small or seeming satisfaction only, so the award be on both sides, may be good enough.* So in *Dyer* it is said, that there must be some thing done by either party to the other, commodious in apparance at the least.

The reason of these cases, may be, because that the arbitrators are made judges of the matters in controversie betweene the parties: and therefore where the submission is of things uncertaine, as trespasse, or the like; in such case if the arbitrators shall adjudge the offences to be equall where they are not so, and so a mutuall discharge on both sides: or shall award the payment of 10 l. where there

there was not 5. s. damage; or but a peny, where peradventure there might be 10 l. damage. In such case there is no remedy because you have made them your judges, and tied your selfe to stand to their judgment. Otherwise it may be where things certaine are submitted, as debt; or the like, as I have shown you before.

And now I shall put you a case of two to the former, *where there is an expresse satisfaction of the one part, and an implied discharge of the other only, and yet the award good.*

An arbitrement, that the defendant shall pay a penny to the plaintiffe in satisfaction of all manner of actions, which he hath paid, is a good barre. 22 H. 6. 33 by Moile.

Nichols and *Grummons* case cited before, if an award be, that an obligor in a single obligation shall pay the debt, this is a void award without there bee a provision for his discharge; because payment is no discharge in that case without an acquittance. Hob. Rep. p. 68. pl. 54

But if the award be, that he shall pay 10 l. for a trespasse, it is good: 22 E. 4. 25 ac.

because

becauſe a ſatisfaction implyes a diſcharge.

Coke lib 8 fo 68.a. Bashpoles caſe

So an award, that the defendant ſhall pay a debt that was due to the plaintiffe, which he alſo promiſed to pay, is good; for there the award is as well of the one ſide as the other; becauſe the one receives the money, and the other is diſcharged of the debt, and of his promiſe to pay it.

Thus you ſee, that where an award is expreſly of one ſide, and implyedly only on the other, that in ſuch caſe the award is good. The next thing to be conſidered is, that though the award be on both ſides, yet,

Where there is no means by Law for either party to attain unto that which is awarded him, the award is void.

22 H 6, 12:8 b. et 19. a.

In treſpaſſe, the defendant pleaded an award, that the plaintiffe ſhould pay to the defendant 10 l. and releaſe to him all actions of treſpaſſe, & after the defendant ſhould releaſe to the plaintiffe all treſpaſſes, which he was alwayes ready to doe, and is

yet,

yet, if the plaintiffe had paid the 10l. and releaſed. In this caſe this was held no good plea; becauſe, that if the plaintiffe had paid the money and releaſed, he could have had no remedy to inforce the defendant to have releaſed; and therefore this award is no bar of the action.

So in a Writ of forger of falſe Deeds, the Defendant pleaded an arbitrement, that the plaintiffe ſhould be non-ſuited in that Writ; and that the defendant who hath an aſſize againſt the plaintiffe ſhould be non-ſuit in this, and ſaith, the day is not yet come, and demanded judgement: in this caſe the plea was held nought, becauſe, that if he had bin non-ſuited in this action, he had no remedy by ſpecialty, or otherwiſe to inforce the defendant to be non-ſuit in the aſſize. 19.H.6 37 b 38.a.

And here *Newton* ſaid, ſhould this be a good plea in a Writ of forger of falſe Deeds for the defendant, to ſay that there was an award, that the plaintiffe ſhould have an acre of land of the defendant in amends: I ſay (ſaith he) that it could not, if he doth not ſay, The which he hath conveyed

ed to him; for there is no remedy in this case to constraine him to convey it to him.

If an arbitrement be that the defendant shall be bound by such a day, which is not come; he shall not plead this in an action of trespasse, for then the plaintiffe should be barred, and should have no action to compell the defendant to make the Obligation. Note Reader, that these cases must be entended where the submission is without specialty, otherwise he were not without remedy,

5 E.4.7.2. 45.E.3.16

In this case, there are these three grounds observable, and warranted by the books.

28.H 6. 12 2.H. 4. 4.5 E.4.7. 19.E.4. 8. 20,H.6.12 Keilway 121 a 19.H.6. 38. a by Nuton p,5. 28. 19.A.6. 37, by Ascue, &. Neaton 9 E,4.44,a. qy. Nedabm.

First, *where the award is for payment of money at a day to come, there the award is good, because an action of debt will lye for the money upon the arbitrement if it be not paid,* or the party may resort to his action againe, if he please.

Secondly, *though the award be of a collaterall thing for which there is no remedy, yet if it be executed, it is good.*

Thirdly, *and lastly, where the award*

is

is of a collaterall thing not executed; yet if the ſubmiſſion be by ſpecialty, the award is good.

Upon theſe grounds you may obſerve theſe four rules to direct you where an arbitrement ſhall be a good plea in barre of an action in theſe caſes.

Firſt, *where the award is for the payment of money, for which you have remedy, and the day of payment not paſt; in ſuch caſe the award is a good plea in barre of the action.* 20.H.6.18 19.28 H.6.12.2.H.4.4.9.E.4 5.1.5.E.4. 7.19.E.4. 8.45.E.3. 16 et. 20. H.6 12.

Secondly, *where the day of payment is paſt it is no plea in barre of the action without pleading of payment.*

Thirdly, *where the day of payment is paſt, yet if there be no default in the defendant; in ſuch caſe, I conceive, the arbitrement not executed, is a good plea in barre of the Action.* 20.H.6.18 Br. Arbitrement.3. 2.H.4.4.

Fourthly, and laſtly, *where the award is of a thing for which the party hath no remedy, though the day be not yet come, in which the thing ought to be done or delivered, in this caſe the award is no plea in bar of the action.* According to theſe differences it hath been ruled in a caſe in the K. Bench, which was thus. 19.H.6. 37.1.E.4, 7.27.H.4 31.

The

Mich. 9. Iac in the Kings Bench

The defendant in tre paſſe pleaded an award that he ſhould inſtantly pay 20 s. to the plaintiffe, and ſo demanded judgement of the action: by *Flemming* Chiefe Iuſtice, *Williams* and *Crooke* Iuſtices it was holden, that the plea was nought, becauſe that he did not ſhew the money was paid, and theſe differences agreed.

An arbitrement pleaded in bar of an action, where the defendant hath not performed the thing, and the day paſt, is no good plea. But where the day of the performance of the thing awarded is to come, and the doing of the thing awarded may be compelled by action, there the arbitrement is a good plea in barre of the action.

And by *Flemming* if the arbitrement be to make a releaſe, or ſuch other collaterall matter, which the defendant cannot be enforced by action to do, in ſuch caſe the arbitrement is no good plea in barre of the action, though the day of performance be not yet come.

And you muſt know Reader, that where the arbitrement is to make a Releaſe

Releaſe, or ſuch other collaterall thing, and the day to come, though the ſumiſſion were by ſpecialty, yet the award would be no plea in barre of an action; becauſe that cannot inforce the doing of it, though it may be forfeited for the thing not done.

And ſo ſaith *Nedham* in 9 E. 4. though the arbitrement be void to this intent that the plaintiffe hath no action to compell the defendant to make the releaſe; yet it is good to this intent, if the party do not performe it, that he ſhall forfeit the penalty of the obligation. But enough of this, the next thing conſiderable, is, 9 E. 4. 44. a.

Where an award ſhall be void becauſe it is not finall?

The arbitrators (as I have often told you) are Iudges of the matters in controverſy referred vnto them, and their award is a judgement: now *iudicium*, muſt not only be *certum* (as is ſaid before) but *determinatum* alſo, it muſt determine the matter in controverſy.

19 H.6.36 Tis true, an award may in ſome caſes (as I have ſhewed before) be good of part of the things only ſubmited, but we muſt vnderſtand this ſo that the award muſt be finall as to that parte, or elſe it will be void.

An award that either party ſhall be Non-ſuit againſt the other in actions commenced by them is void, becauſe it makes no end of the matters in controverſy.

And every arbitrement, ſaith the Booke, ought to make an end and finall determination of the things in diſpute and controverſy; which it doth not in this caſe, becauſe that notwithſtanding the Nonſuits, they may commence their Suites, *de novo*.

5 H.7.fo. 23. And vpon this ground, as alſo the former authority, I conceive that the Booke in 5. H. 7. is no Law; where there is an opinion that an award of a Nonſuit may be good, but it is vpon this reaſon, becauſe it is not only the act of the Court, but the act of the party alſo. But if it were wholy the act of the party, yet for the reaſon before given, becauſe it is no final concluſion, I conceive it cannot be good

for

for this is but like blowing out of a candell, which a man may at his own pleasure light againe.

So, in all those cases that I have put you before, where the award is of one side only, it is void also for this reason; because it doth not determine the controversies between them, and the controversies cannot be ended, without they be ended in respect of both parties.

So likewise in the cases that I have put you before, where the award is uncertain, it is also voide for this cause, for that it is not finall. For an uncertaine award cannot decide the matter in controversie, but is more apt to beget new strifes and variances, then to conclude the old. Coke li. 5. fo. 78. a. Samons case.

In 8 E. 4. an award is made, that an action shall be conceived betwixt the parties by the advice of S. and F. I do conceive in this case the award is void, because it is not finall: for this concludes not the controversie, but leaves it to the judgement of law: See fo. 16. b. 8 E. 4. 11. a

Warley and *Beckwiths* case, in debt upon a bond to stand to an arbitre-

Hob.Rep. P.306.pl. 281.

ment : the arbitrators award that the defendant shall pay severall sums to the plaintiffe, which were alleaged by the plaintiffe to be done unto him. And further, that if the defendant at, or before the Feast of S. *Andrew* the Apostle, then next following, should before the said arbitrators disprove the debt, or any part thereof, then so much should be deducted out of the payment of the severall summes aforesaid, &c.

Tis true, I finde no judgement in this case, yet I conceive the Law will be somewhat strong in it, that the arbitrement is void, because it leaves the matter in suspence and undecided, whereas it ought to be finall and conclusive. And besides, this is upon the matter a reserving of power to make a second arbitrement, which I conceive they cannot do.

41 & 42 of the Qu. in the Common pleas

I shall conclude this point with that ingenious conceit of *Herne*, in *Emery* and *Emerys* case, remembred before, only a word or two more of his added.

An arbitrement, saith he, is like a fine, wherein the Judges are arbitrators:

trators: one hath land, *& pro hac concordia*, the other hath mony; therfore fines upon condition are refused because not finall.

So the Law doth reject all arbitrements that are conditionall, or wch leave the matters in controversie in suspence, or unconcluded. For as a fine is so called because that it doth *finem litibus imponere*: so the proper work or office of an arbitrement, is to put an end to controversie.

So *Telverton* in 8 E.4. An arbitrement, saith he, is used for the Common weale, for to decide debates and wrongs amongst the people, as fines are; here hee likewise joynes them both together. 8E.4.12.b

And the very words of the condition in every bond to stand to an award, will sufficiently instruct the arbitrators what they are to do in this behalfe (which certainly prudent Antiquity put in to that very purpose) where the parties doe submit themselves to the arbitrement, sentence, and finall determination of the arbitrators: and therefore the award is not according to the submission, if

it be not finall: the next thing to be considered, is,

Where an award against law shall be void.

It may be aptly demanded, what I intend by an award against law: for every award that is not according to law; as where it is uncertaine, impossible, or the like (as I have shown before) may bee truly said to bee against law: and therefore this will be but *actum agere*, to shew, that an award against law shall be void.

8E.4.12.b By *Billing* in 8 E.4. an award which is impossible is against the law: for (saies he) the law is upon possibility and reason, therefore that which is impossible is against law.

19 E.4.1.8 So by *Nele* and *Choke*, an award which is made in parcels, or which enjoynes a thing not in the power of the party, is against law.

9.H.716. a.b. By *Keble* also in 9 H. 7. an award that a man shall pay more then of right he ought to pay, is against law.

Tis true, that all these, or the like, in a general acceptation of the words may

may be ſaid to be againſt law, becauſe they do not agree with the law.

But in a more particular and reſtrained acceptation of the words, that is properly ſaid to bee againſt law; which is either *malum in ſe*, or *malum prohibitum*; that is, either againſt the Commandements of God, or the Decrees Maxims and Principles of the Law, as appeares by the books in the margine. And in this ſenſe properly I conceive the Law is to be underſtood, where it ſpeaks of an award againſt law.

Coke, Littleton, fo. 206.b. 42 E.3.6. 2 H.4.9. 19 H.6.35

And therefore if an award be, that the defendant ſhall kill or rob I. S. or that he ſhall maintain the plaintiffe in ſuch a ſuit: or that he ſhall be bound to the plaintiffe, being a Sheriffe, to ſave him harmeleſſe if hee ſhall imbeſil a Writ, or ſuffer an eſcape; or that he ſhall forge ſuch a deed or writing for the plaintiffe, or the like: in ſuch caſes, I conceive, the award will bee void, becauſe it enjoynes things againſt the law. But of this ſufficient. The next and laſt thing to be conſidered is,

Where an award made at several times, or by parcels shall be void?

19 E. 4 f. 2 by Choke. An award, that the defendant shall pay a certaine sum of money to the plaintiffe, and that the surety for payment thereof should be by the advice of the arbitrators: this by *Choke* is a void award, because that the arbitrators cannot make their award twice; for every arbitrement ought to be made entirely, and not by parcels. And here is first an award for the payment of the money: and then here is another part of the award for the sufficiency of the security, and these at severall times, which cannot be.

39 H. 6. 9. By *Danby* Justice, if the arbitrators arbitrate part one day, and part another day, and give their judgement, there the second is void; but they may commune upon one point one day, and another, another day: so that they do not give their judgment *nisi unica vice* for all.

27 H. 7. Keilway. f. 43. pl. 10. And by *Yaxley*, an arbitrement void in part, is void in the whole; for

for an arbitrement cannot be made, by parcels.

I conceive Reader, that this point will ſtand upon this difference, where there are ſeverall awards made and where but one award made at ſeverall times or by parcels. I conceive they cannot make ſeverall awards: Firſt becauſe that were not agreeable to the ſubmiſſion; in which the parties binde themſelves to ſtand to the award and arbitrement of the arbitrators; and by theſe words in the ſubmiſſion, they have no power to make ſeverall awards or arbitrements: and when they have made one arbitrement, they have executed their power and authority, and therfore a ſecond arbitrement will bee void. And again, by the ſame reaſon that they might make two awards, they might make twenty, which were very inconvenient.

But now on the other ſide, I conceive that an award may be made at ſeverall times or by parcells ſo that it be not delivered vnder their hands according to the ſubmiſſion untill the whole be made.

And

And certainly that which is principaly required in every arbitrement is, that it be agreeable in ſubſtance and circumſtance to the ſubmiſſion; which it may well be, though it be made at ſeverall times or by parcells, ſo that it be made and delivered according to the ſubmiſſion, at the time appointed.

And I conceive all that is done by the arbitrators, is but as a comuning or diſcourſe concerning the matters in controverſy ſubmited unto them; for that they may vary in their iudgments, as they ſhall ſee occaſion, for they have liberty to arbitrate according to their diſcretions, ſo they have an eye to the ſubmiſſion. I ſay, I conceive all as nothing untill they have finiſhed and delivered the arbitrement, which is the complement and perfection of it.

Beſides, where the ſubmiſſion is of many things, and thoſe of great difficulty, if the Law ſhould be that the arbitrators might not make their arbitrement by parcells, it might be very miſcheivous to the parties, eſpecially conſidering that ſubmiſſi-

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ons are moſt commonly to illiterate men.

Neither is my opinion groundleſs or without authority; for by *Moile* in 39. H.6. an arbitrement may well be made in parcells, ſo that all be made before any day aſſigned. 39 H.6.9.

I have now finiſhed this poore indeavour of mine of ſhewing you what arbitrements are good in Law and what not. I ſhall only adde this one Rule concerning the vnderſtanding or expoſition of arbitrements, which will be very vſefull in that particular, and ſo conclude all; and that is,

That an award or an arbitrement ſhall be conſtrued according to the intent or meaning of the arbitrators and not according to the words only, as you ſhall find by the Bookes quoted in the Margine. 21.E.4.39 a. 19 H.6.36 37. Coke li.10 fo.57.b.

FINIS.